United States Court of Appeals

for the Second Circuit



APPELLANT'S APPENDIX

74-1693 ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

MARY BROEDY,

Appellee,

vs.

PHYLLIS McGUIRE,

Appellant.

On Appeal from Judgment of the United States District Court for the Southern District of New York.

APPELLANT'S APPENDIX

WEIDLICH & ROGERS
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300 Madison Avenue
New York, New York 10017
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UNITED STATES COURT OF APPEALS
JUN 26 1974
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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PROCEEDINGS

Complaint (Record on Removal) filed September 23, 1969

Answer. Filed January 5, 1970.

Demand for Interrogatories. Filed October 3, 1969.

Answer to Demand for Interrogatories. Filed December 11, 1970

Non-Jury Trial begun and concluded, November 12-13, 1973.

Judge's dec. reserved. Lumbard, C.J.

Opinion No. 40118. Filed December 13, 1973.

Plaintiff will be awarded damages of $15,240.34 and appropriate interest. Plaintiff is also entitled to costs pursuant to 28:1920. The parties are directed to submit an appropriate judgment including computations of the interest on each invoice together with memoranda to support such computations within 15 days. This Opinion constitutes the Court's Findings of Fact and Conclusions of Law for purposes of Rule 52(a) F.R. Civ. P. So ordered -- Lumbard, C.J. (sitting by designation).

Memorandum that Plaintiff's calculations of interest must be accepted as accurate to this must be added $7.62 in accrued interest for the first three days of January, 1974, etc.
Accordingly judgment will be entered for $15,240.15 with interest accrued of $11,276.35 plus appropriate costs. So ordered. Lumbard, C.J. Filed January 3, 1974.

Judgment No. 74,034 entered - Clerk, January 7th, 1974.

Docket Entries

Notice of Motion of Defendant for partial new trial and to set aside, alter and amend certain findings and conclusions with supporting affidavits of Clifton F. Weidlich and Fred Alexander and Exhibits. Filed January 14, 1974

No appearance in opposition. Bill of Costs taxed in favor of Plaintiff in the amount of $206.15 and added to the judgment. February 6, 1974.

Answering Affidavit of Isidore Drimmer, filed May 14, 1974.

Reply affidavit of Clifton F. Weidlich, sworn to February 19, 1974. Filed February 19, 1974. Also memo of law of defendant McGuire.

Memorandum - for reasons indicated the motions of defendant are denied. So ordered -- Lumbard, C.J. Filed February 27, 1974.

Defendant's motion for reargument and stay, with affidavit FRCP 52 and 59. Filed March 13, 1974.

Memo endorsed denying defendant's motion for reargument and stay. So ordered, Lumbard, C.J. Filed March 18, 1974.

Defendant's Notice of Appeal to U.S. Court of Appeals. Filed March 27, 1974.

Motion for extension of time for transmission of record. Memo endorsed, granted to May 15, 1974. Filed on or about May 1, 1974.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX
----------X

MARY BROEDY,

Plaintiff,

-against- COMPLAINT

PHYLLIS MCGUIRE,

Defendant.
----------X

PLAINTIFF complaining of the defendant by LEIGHT, DRIMMER & WEINSTEIN, her attorneys, respectfully alleges:

1. At all times hereinafter mentioned plaintiff was and is a resident of the County of the Bronx, City and State of New York.

2. The defendant, PHYLLIS MCGUIRE, while a resident of the State of New York, entered into a contract within the State of New York with the Plaintiff with the service relating to and the sale of household furnishings for her New York apartment.

3. Heretofore and between the first day of October, 1961 and the thirtieth day of December, 1964 the plaintiff sold and delivered to defendant certain goods, wares, services and merchandize consisting of various and sundry household furnishings which said goods, wares, services and merchandize were reasonably worth for which defendant promised and agreed to pay the sum of $18,234.58.

4. No part of the said sum of $18,234.58 has been paid although the same has been duly demanded.

WHEREFORE plaintiff demands judgment against the defendant in the sum of $18.234.58 plus interest and costs and disbursements of this action.

LEIGHT, DRIMMER & WEINSTEIN
Attorney for Plaintiff
36 West 44th Street
New York, New York 10036
MU-2-3206

ANSWER (Filed January 5, 1970)

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK

(Same Title)

FIRST DEFENSE

Defendant denies each and every allegation of the plaintiff's complaint.

SECOND DEFENSE

The right of action set forth in complaint did not accrue within six years next before the commencement of this action.

THIRD DEFENSE

The alleged agreement set forth in the complaint by its terms was not to be performed within one year from the making thereof and neither said agreement nor any note or memorandum thereof was ever made in writing and subscribed by the party to be charged therewith as required by the laws of the State of New York.

WHEREFORE, defendant demands judgment dismissing the complaint.

WEIDLICH & ROGERS

By CLIFTON F. WEIDLICH

CLIFTON F. WEIDLICH, Partner
Attorneys for Defendant,
55 Liberty Street,
New York, N.Y. - 10005.
(212) CO 7-1662.

DEFENDANT'S DEMAND FOR INTERROGATORIES (Filed October 3, 1969)

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

(Same Title)

S I R S :

PLEASE TAKE NOTICE that defendant, PHYLLIS McGUIRE, requests and demands that the Plaintiff herein answer the following interrogatory within fifteen (15) days from the date hereof, pursuant to Rule 33, F.R.C.P.:

1. State the date and under what circumstances the plaintiff first made contact with defendant.

2. If such contract was in writing, attach such writing or writings.

3. If such contract or contracts was oral, state the name and address of the party representing plaintiff and his representative capacity.

4. State the time when and place where in the years 1961, 1962, 1963 and 1964 when plaintiff sold and delivered goods, wares, services and merchandise to defendant, itemizing the household furnishings supplied and services performed on each such occasion.

5. State where defendant's apartment was located at any and all times referred to in the complaint.

6. Whether or not any payment was made by defend-

(2)

Defendant's Demand for Interrogatories

ant to plaintiff, or by any representative of defendant to plaintiff, or her representative, at any time, stating the amount of such payment or payments.

Dated: September 26th, 1969.

WEIDLICH & ROGERS

By CLIFTON F. WEIDLICH
Clifton F. Weidlich, Partner
Attorneys for Defendant,
55 Liberty Street,
New York, N.Y. - 10005.
(212) CO 7-1662.

TO:

LEIGHT, DRIMMER & WEINSTEIN, ESQS.,
Attorneys for Plaintiff,
36 West 44th Street,
New York, N.Y. - 10036.

PLAINTIFF'S ANSWER TO INTERROGATORIES (Filed December 11, 1970)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Same Title)

PLAINTIFF, by her attorneys LEIGHT, DRIMMER & WEINSTEIN for her answer to demand for interrogatories respectfully alleges:

1. The plaintiff first made contact with the defendant at Christine McGuire's (Teeter) apartment at 345 East 68th Street New York, N.Y. late in the fall of 1957 or 1958. The plaintiff was working on the apartment of Christine McGuire at the time that she met the defendant.

2. There was no written contract relating to the services and goods supplied by the plaintiff to the defendant. It is customary in the trade not to effect a written contract. However, there was numerous correspondence between the parties which verified the defendant's desire for Miss Broedy to proceed with her work.

3. The plaintiff and the defendant represented themselves at all meetings relating to the job to be done. In addition one Enis Jobe, who served as Miss McGuire's housekeeper, was present at numerous occassions when the plaintiff and defendant discussed the job and was present on many of the occassions when the goods were delivered to Miss McGuire's apartment.

4. The following is a list of items ordered by the defendant:

DATE	ITEM	AMOUNT
1/18	1 Sofa bed	$ 925.00
	1 Desk chair	165.00

DATE	ITEM	AMOUNT
1/18	1 Desk	$ 525.00
	1 Lamp Table	245.00
	1 Table Lamp and Shade	95.00
	1 Desk Lamp and Shade	200.00
	2 Oriental Chairs	590.00
12/23/64 Dec 61	1 Chaise lounge 1 rocker recovered - fabric scotch guard	367.20
1/21 11/26/61	Decoration restored on one vase	10.00
	closet removed from den	50.00
1/8/62	French curtains yellow, antique tapata underlining, underline draperies Double rod installation corners to match wall paper border	1184.50
2/7/62	Removal of crystal dinning room chandelier, hanging of chnadelier in dinning room and foyer and living room	35.00
2/7/62	One chandelier for living room	468.50
2/16/62	Packing and shipping chandelier lamp and table to Ohio	92.13
3/12/61	Switch plates radio and misc items	122.16
6/1/62	Six doors repaneled	370.80
6/14/62	Carpet for den and hall plus vynl for kitchen	641.57
6/14/62	Oriental windows for den plus curtains	500.58
6/16/62	2 Sections added to dresser marble top for dresser, marbel tops for night tables	996.20
6/15/62	Window guards for bedroom	154.50
6/18/62	Spe shelves installed in window	208.85
6/28/62	End table and one begier chair for living room	655.90
6/21/62	Vynl for closets installation in for closets	105.69
6/23/62	Shower curtain for bath	19.36

DATE	ITEM	AMOUNT
6/22/62	Hangers	271.82
6/29/62	Shoe boxes	38.16
3/24/62	Towels and spread	64.79
5/11/62	Nine tassels	34.77
6/21/62	Upholstrey for closet	64.31
6/21/62	Vynl floor, foyer, hallway bedroom and den	578.59
6/21/62	den bathroom	52.92
6/22/62	gold hamper rubbish can	75.91
6/23/62	paper hanging and painting of apartment	1040.00
6/28/62	Picture framing	24.72
6/28/62	Handyman in building 525 Park Avenue	32.00
7/3/62	One center bowl, bronze, one jewel box	113.30
8/10/62	Custom bathroom furnishings and fixtures ordered from American S.E.R.P.E. Corp.	4541.50
8/28/62	One oriental chest	679.50
8/21/62	Misc items, for den	21.63
8/24/62	One swivel bench	96.82
8/24/62	25 pictures framed	131.06
8/31/62	2 bath mats	17.51
8/31/62	10 door locks, plated	57.50
	One bedroom rug and one foyer rug custom made	2641.95
12/15/62	One oriental fixture with chain plus installation	139.06
12/62	One five section cocktail table, oriental	497.90
12/61	10 doorknobs and back plates installed	97.85
12/62	7 pictures framed	57.32
12/62	linens, six sets	280.42
12/62	one bronze lamp and shade for living room	216.30

DATE	ITEM	AMOUNT
12/62	one bathroom rug for den	71.76
5/63	one chair crated and shipped to Ohio	22.00
5/64	one poys bench recovered	49.50
12/63	one double bench for piano	253.60
1/64	9 pictures framed	52.99
1/64	1 bathroom chandlier plus installation	76.95
TOTAL		$21,122.35
Less deposit		5,000.00
		$16,122.35
Agreed 10% commission		2,112.23
TOTAL DUE		$18,234.58

5. The defendant's apartment was located at 525 Park Avenue, New York, N.Y.

6. Defendant made one payment to the plaintiff of $5,000 on or about the 10th day of November, 1961.

Dated: New York, N.Y.
October 10, 1969

LEIGHT, DRIMMER & WEINSTEIN

by:

ROBERT A. GERSHUNY ESQ., Associat
Attorney for Plaintiff
36 West 44th Street
New York, N.Y.
MU-2-3206

TO: WEIDLICK & ROGERS
Attorneys for Defendant
55 Liberty Street
New York, N.Y. 10005
CO-7-1662

OPINION (Filed December 13, 1973)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(Same Title)

Appearances:

Leight, Drimmer & Weinstein
Attorneys for Plaintiff
36 West 44th Street
New York, New York 10036
By: Isidore Drimmer, Esq.

Weidlich & Rogers
Attorneys for Defendant
300 Madison Avenue
New York, New York 10017
By: Clifton F. Weidlich, Esq. and
William F. Weidlich, Esq.

LUMBARD, Circuit Judge:*

This case was instituted on August 26, 1969, in the Bronx County Supreme Court by Mary Broedy, an interior decorator, against Phyllis McGuire, an entertainer and member of the McGuire Sisters, for goods and services rendered. Service of process was obtained on McGuire in Nevada, where she currently resides, under the New York long-arm statute, N.Y.C.P.L.R. § 302. McGuire removed the case to this court because of diversity of citizenship in September 1969 and filed an answer denying liability and asserting the defenses of the statute of frauds and the

*Sitting by designation.

statute of limitations. A two-day trial without a jury was held on November 12-13, 1973. The parties agree that New York law governs.

I

The evidence adduced at trial showed that Broedy together with her partner, Dudley Sills, had performed decorating services in McGuire's apartment at 525 Park Avenue in New York City. In early 1961 McGuire still owed money to Sills and Broedy and after some discussion paid Broedy $5,000 in cash in settlement of this claim. At this time Broedy told McGuire that she was separating from Sills and McGuire indicated a desire to have Broedy do further work for her. In October 1961 McGuire called Broedy to her apartment and authorized her to begin work redecorating her apartment. At this time McGuire gave her a deposit of $5,000 in cash.

Between December 1961 and May 1964, Broedy bought and delivered to McGuire's apartment furniture and furnishing billed at $16,699.34,[1/] as listed in the invoices lumped together as plaintiff's Exhibit 1. Broedy testified that all these items were placed in McGuire's apartment, that McGuire found them to be satisfactory and that the prices on the invoices were the fair market value of the items. She said that she only sent invoices if McGuire was satisfied; if McGuire was not, the goods were taken back free of charge.

Defendant's denials were unpersuasive. She showed a surprising lack of memory concerning whether goods had been delivered to her. Her claim that all work other than that done in the bathroom was done by Sills and Broedy befo

October 1961 is both unconvincing and unsupported. Surely she would have known if she had received invoices for work for which she had paid. The fact that invoices from Broedy totalling only $9,481.32 were found in defendant's files in Las Vegas does not show that invoices for the remainder were not sent or that the merchandise was not delivered. This court finds that the merchandise in Exhibit 1 was delivered to McGuire and the prices charged were the fair market value.

Also in October 1961, it was agreed that Broedy would redo McGuire's bathroom. This was done while McGuire was in London doing a command performance before Queen Elizabeth. For several reasons, the work in the bathroom did not satisfy McGuire. Broedy never billed her for this work but instead set about to put in new fixtures. With defendant's knowledge and permission she contracted in August 1962 with the American S.E.R.P.E. Corporation for custom-made fixtures for McGuire's bathroom. These fixtures were made in Europe and in June 1963 the president of the corporation, N. Steinhardt Muller, wrote McGuire to tell her that there had been some delay but that the fixtures would arrive soon. When they did come at the beginning of August 1963, Broedy called defendant who said she would set a date for delivery, which she never did. Defendant refused to talk to Broedy when she called later. Muller also called McGuire but she hung up after he identified himself. The fixtures are not suitable for any other bathroom and currently sit in a warehouse in Hoboken, New Jersey.

Broody now seeks the $4,541.00 that American S.E.R.P.E. charged her. In addition she claims the $2,858.00 that the original bathroom cost her. Although she never intended to charge McGuire for this work, she says that she would have been able to resell some of the parts if McGuire had allowed her to remove them and install the American S.E.R.P.E. fixtures.

In addition Broody claims $2,410.68 as a commission of 10% on the merchandise sold to McGuire. She says that she sold the merchandise at cost and that this commission was her profit. Plaintiff has not met her burden of proof on this claim. The numerous invoices sent McGuire never mentioned a commission. It is only natural to assume that each invoice would include a commission if the parties had agreed to such a fee.

When Broody replaced one set of rugs with another, the old rugs were put in storage. Eventually the rugs were sold for $1,000.00. There is a dispute over whether McGuire authorized the sale and told Broody to keep the proceeds for herself, but apparently both agree that the final judgment for plaintiff must be reduced by $1,000.00.

II

Defendant's claim that the statute of frauds bars this claim can be quickly dismissed. The applicable statute, Personal Property Law § 85,[2] effective September 1, 1960, excepts from the requirement that there be a written memorandum situations in which the buyer has received the goods. The American S.E.R.P.E. bathroom was not received but it is excepted as goods specifically manufactured for the buyer.

III

Resolving the statute of limitations defense is more complex. All but three of the invoices were sent before August 26, 1963 and the American S.E.R.P.E. bathroom was ready for delivery at this point. The applicable statute of limitations is six years, N.Y.C.P.L.R. § 213(a), and thus most claims here would be barred unless this statute has either been tolled or is not applicable. Plaintiff has several suggestions for achieving this result, but all but one must be rejected.

Plaintiff testified that she and McGuire had agreed that no bills would be due until the entire job was finished. From this it is argued that the statute of limitations did not start to run until 1964. The evidence in support of this argument is, however, not convincing. The invoices sent never included a running balance of the total amount due, which one would expect if payment was to be deferred to the end. Also, so far as one can see there was no end; the transactions simply petered out as relations came to an end. Therefore, each invoice must be viewed separately.

Broedy next contends that her selling of the rugs and crediting McGuire's account in 1965 constitutes a partial payment on the debt which starts the statute running anew from that date. But to achieve this effect there must be a convincing acknowledgment that more than the partial payment is due. Crow v Gleason, 141 N.Y. 489 (1894); Trans America Development Corp. v Leon, 279 App.Div. 189, 108 N.Y.S.2d 769 (1951), aff'd mem, 305 N.Y.590, 111 N.E.2d 646 (1953). Nothing in this record indicates that McGuire said she owed Broedy more when she authorized sale of the rugs, if she authorized it at all.

Plaintiff also contends that the sale of the rugs set up a mutual account pursuant to N.Y.C.P.L.R. § 206(d), which would mean the statute of limitations would start running in 1965, the date of the last transaction. A mutual account is where the parties sell each other goods with the understanding that sometime in the future they will settle their accounts with one another. It is clear that merchandise delivered for payment of debt, as is the case here, is not a mutual account. In re Bartlett, 272 App.Div. 1068, 74 N.Y.S. 2d 861 (1947), aff'd mem., 298 N.Y. 747, 83 N.E. 2d 149 (1948).

Finally, and more successfully, Broedy contends that the statute was tolled because McGuire moved from New York in June 1967. N.Y.C.P.L.R. § 207 provides that if after a cause of action has accrued against a person, he or she departs from the state and remains continuously absent therefrom for four months or more, the time of absence is not part of the time within which the action must be commenced.

The evidence indicates that McGuire moved to Las Vegas, Nevada in June 1967. McGuire stated this in an answer filed to a request for admission dated March 16, 1972, and her attorney in an affidavit filed in connection with a motion for summary judgment said the same thing. In a later amended response and at trial, however, McGuire stated that she kept her residence in New York until October 1968 and that she merely bought the house in Nevada in June 1967.

The first version is more plausible. The court finds that McGuire changed her residence in June 1967 although she continued to pay rent on the New York apartment until October 1968 which she used occasionally for a few days at a time.

Defendant claims that even if she did move in 1967 the statute was not tolled because N.Y.C.P.L.R. § 207(3) prevents tolling when the defendant can be served without personal delivery of process within the state. McGuire maintains that plaintiff could have served her under the long arm statute, N.Y.C.P.L.R. § 302, or by some form of substituted service, N.Y.C.P.L.R. § 308(5). See generally Goodemote v McClain, 40 App.Div.2d, 22, 337 N.Y.S.2d 79 (1972). Plaintiff argues that this provision only applies when the defendant's whereabouts are known, which she says is not the case here. This issue need not be decided because subdivision (3) of § 207 does not apply to this case. That subdivision was added in 1962 and became effective on September 1, 1963.[3/] This was after the claims allegedly barred by the statute of limitations had accrued. N.Y.C.P.L.R. § 218(b) says that if an action has accrued when the law becomes effective, the court should apply the provision, either old or new, that allows the action.

McGuire also contends that she was never absent from New York for more than four months. Although absence from the state and not residence outside is the test, Mack v Mendols, 249 N.Y. 356, 164 N.E.2d 248 (1928), residence outside the state puts the burden on the defendant to show sufficient presence in the state to prevent a tolling,

McAvoy v Harron, 26 App.Div.2d 452, 275 N.Y.S.2d 348 (1966). McGuire's testimony that she stayed in New York after certain engagements was vague and conclusory. It is settled that casual trips into the state do not break the continuity of the absence, Connecticut Trust & Safe Deposit Co. v Wead, 172 N.Y. 497, 65 N.E. 261 (1902). It was incumbent upon McGuire to be more specific about the amount of time that she spent in New York. For purposes of the statute of limitations, the court finds that McGuire was absent from New York after June 1967 and that no time after that date can be used in determining whether six years have elapsed. Therefore, no claim by plaintiff is barred by the statute of limitations.

IV

The plaintiff is thus entitled to recover $16,699.34 as listed in the invoices. She is also entitled to $4,541.00 for the American S.E.R.P.E. bathroom. She cannot, however, recover the alleged commissions or the cost of the first bathroom as she never intended to charge McGuire for the first bathroom. If McGuire had fully performed, Broedy could only recover the salvage value of the first bathroom. Broedy testified that some of the parts were stock and could be resold, but she did not say for how much. Since plaintiff has introduced no evidence concerning the salvage value of the bathroom she has not met her burden of proof. Therefore Broedy is entitled to a subtotal of $21,240.34. From this must be deducted the $5,000.00 deposit and the $1,000.00 gained on the sale of the rugs for a net of $15,240.34.

N.Y.C.P.L.R. §§ 5001-04 provide that interest shall be awarded from the date the action accrues until the date of judgment. Section 5001(b) says that interest should be figured from the earliest ascertainable date that the cause arose. The Court of Appeals for the Second Circuit has held that the district courts must award interest pursuant to this section when New York law governs, Spector v Mermelstein, doc. nos. 72-1939, 73-1198, 73-1209 (2d Cir. Sept. 11, 1973). Here the cause of action for the invoiced goods has accrued on the dates the invoices were sent. These invoices were demands for payments and from their dates each cause of action accrued. Cf. In re West, 257 N.Y. 108, 177 N.E. 389 (1931). The American S.E.R.P.E. bathroom was ready in August 1963. By the end of August it was clear that McGuire was refusing the bathroom. The earliest ascertainable date for this cause is September 1, 1963.

The deposit and proceeds from the sale of rugs will be credited to the earliest invoices. The applicable interest rate has fluctuated during the relevant period. Section 5004, N.Y.C.P.L.R. originally said that interest shall be at the legal rate, then 6%. In 1968, an amendment to N.Y. General Obligations Law § 5-501(1) allowed the Banking Board to set higher legal rates, which it proceeded to do. The legal rate was increased to 7 1/4% and then to 7 1/2%. See generally Gelco Builders & Burjay Construction Corp. v Simpson Factors Corp., 60 Misc. 2d 492, 301 N.Y.S. 2d 728 (Sup.Ct. 1969). In 1972, § 5004 was amended to make 6% the interest rate on judgments, but this change is prospective only. Therefore, the interest rate is 6% until June 30, 1968; 7 1/4% from July 1, 1968 until February 15,

1969; 7 1/2% from February 16, 1969 until August 31, 1972; and 6% thereafter.

Accordingly, plaintiff will be awarded damages of $15,240.34 and appropriate interest. Plaintiff is also entitled to costs pursuant to 28 U.S.C. § 1920. The parties are directed to submit an appropriate judgment including computations of the interest on each invoice together with memoranda to support such computations within 15 days.

This opinion constitutes the court's findings of fact and conclusions of law for purposes of Rule 52(a), F.R.Civ.P.

SO ORDERED.

J. EDWARD LUMBARD
Circuit Judge

Dated: December 13, 1973.

1/ Plaintiff said this figure was $16,707.34 but the adding machine tape on which this was based showed a December 15, 1962 invoice as being $288.42, when in fact it was $280.42.

2/ All transactions at issue occurred prior to the effective date of the New York Uniform Commercial Code.

3/ The rest of § 207 is essentially § 19 of the old Civil Procedure Act, [1943] N.Y. Laws, ch. 263.

MEMORANDUM AND JUDGMENT (Filed January 3, 1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Same Title)

LUMBARD, Circuit Judge:*

As directed by this court's opinion of December 13, 1973, the parties have submitted their calculations of interest due to Mary Broedy from Phyllis McGuire. Broedy claims the interest due to December 31, 1973 is $11,268.73. McGuire's figure, surprisingly enough, totals $11,458.88, or $190.15 more than plaintiff's. Not so surprisingly, McGuire claims various deductions from this total.

Defendant notes that plaintiff's table of calculations shows the American S.E.R.P.E. bathroom as being figured from August 10, 1962, rather than September 1, 1963, as directed by the court. But since the plaintiff's and the court's own totals are similar, it seems likely that the error was merely in marking down the wrong date rather than calculating from the wrong date. Therefore, the plaintiff's figure will be accepted as accurate. To this must be added $7.62 in accrued interest for the first three days of January 1974.

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* Sitting by designation.

Memorandum and Judgment

McGuire says that one invoice dated from May 31, 1962 was in fact not received by her until it was given in answer to interrogatories on October 30, 1973. Therefore, she argues that interest should be accrued only from the latter date. As noted in the opinion, the fact that McGuire did not find an invoice in her files does not show that one was not sent. The interest in the invoice is properly calculated from May 31, 1962.

Next, McGuire claims that no interest should be allowed on the American S.E.R.P.E. bathroom since no demand for payment was made. As the opinion pointed out, the interest accrues from the earliest date that the cause of action was ascertainable, not when payment was demanded. McGuire also argues that the American S.E.R.P.E. invoices show a labor charge of $853.00, which labor she claims was never performed. Boredy's testimony, while sketchy, was that she paid American S.E.R.P.E. the entire amount claimed in the invoices, and the court credited this testimony.

Finally, McGuire claims that the $5,000.00 "deposit"

she gave Broedy in 1961 should draw interest which should then be deducted from the total accrued interest of $11,268.73. No authority is cited in support of this proposition. The deposit was credited to the earliest invoices totalling $5,000.00, and no interest has been accrued on these invoices. Interest here only accrued on the unpaid invoices, not on McGuire's payments, even if made before any work was performed.

Accordinly, judgment will be entered for $15,240.15 with interest accrued of $11,276.35, plus appropriate costs.

SO ORDERED:

s/ J. Edward Lumbard
J. EDWARD LUMBARD
Circuit Judge
(Sitting by designation)

Dated: January 3, 1974.

Judgment entered January 7, 1974
s/ Raymond F. Burghardt,
Clerk

BILL OF COSTS ANNEXED TO FOREGOING MEMORANDUM AND JUDGMENT

2/6/74 No appearance in opposition Bill of Costs taxed in favor of the plaintiff in the amount of $206.15 and added to judgment.

s/ Raymond F. Burghardt,
Clerk

MOTION FOR NEW TRIAL, ETC. UNDER FR.Civ. P. 52(b) AND 59
(Filed January 14, 1974)

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

(Same Title)

Defendant moves the Court under FRCP 52(b) and 59 for a partial new trial or rehearing and to set aside, alter and amend certain findings of fact and conclusions of law and the judgment in the sum of $26,516.69, entered herein on January 3rd, 1974, upon the affidavits of Fred Alexander, sworn to on December 24th, 1973, and of Clifton P. Weidlich, sworn to on January 10th, 1974 in the following particulars:

(1) Add the conclusion that service of process was made on defendant in Nevada under N.Y. CPLR, 302(a)(1) on August 28th, 1969.

(2) Amend the Finding (Decision, p. 6) as to removal and sale of 2 rugs owned by defendant to read:

"Defendant never authorized the removal in 1962 or sale in 1965 of her two Persian rugs."

(3) Amend the finding (Dec. p. 6) as to defendant's change of residence to read:

"Defendant removed from 525 Park Avenue, New York City, to her new home in Las Vegas, Nevada in September, 1968, at that time her occupancy as a tenant of Apt. 8-C, 525 Park Avenue from July 1959 was terminated, she being a holdover tenant from October 1967 to September 30th, 1968."

(4) Amend the finding that McGuire changed her

residence in June 1967 (Dec. p. 7) to read:

"Defendant maintained her New York apartment at 525 Park Avenue from July 1959 to September 30th, 1968, before and after acquiring title to another residence in Las Vegas in June 1967."

(5) Amend the finding that defendant was absent from New York after June 1967 to read:

"Defendant was never absent from New York for four continuous months from June 1967 to October 1st, 1968."

(6) After performance of defendant's engagement whether in or out of New York (except at Las Vegas) defendant invariably returned to her New York apartment.

(7) Prior to September 1968, defendant seldom stayed at her Las Vegas residence.

(8) Amend the conclusion of law (Dec. p. 8) that no claim by plaintiff is barred by the 6-year statute of limitations (CPLR 213) to read, consistently with the findings of fact as so amended, to read:

"The claim of plaintiff except as to three items of goods or services, amounting to $324.10 (Ex. 1, Invoices Nos. 53, 54 and 55) is barred by defendant's affirmative defense of the Statute of Limitations and the Statute was not tolled under CPLR 207, second clause, by defendant's departures from the State for four continuous months."

(9) Amend the conclusion that plaintiff is entitled to recover a subtotal of $21,240.34 or the net sum of $15,240.34 to read:

"Plaintiff is entitled to recover for items and services not barred by the statute the sum of $324.10, with appropriate interest, against which should be offset the $1,000.00 gained by plaintiff on the sale

of defendant's rugs."

(10) Amend the conclusion that the cause of action for invoiced goods were demands for payment, that for the non-invoiced bathroom the breach occurred on September 1st, 1965, that the causes of action accrued from the dates of the invoices and the breach and interest of $11,276.25 awarded to plaintiff to the date of judgment by striking out such award from the judgment and inserting in lieu thereof the amount of appropriate interest on $324.10 from August 26th, 1969 to the date of judgment, offset, however, by the sum of $1,000. mentioned above.

(11) The Court erred in law in imposing upon defendant the burden of proof as to her presence in New York after June 1967; if not, she has sustained the burden of her presence in New York and amenability to service of constructive or substituted process therein.

(12) Add to the conclusions of law that plaintiff with due diligence could have served defendant with process by substituted service up to October 1968 under Sections 230 and 231, C.P.A.

(13) The Court's construction of N.Y. CPLR 207 in conjunction with CPLR 218(b) was erroneous and beyond its powers.

(14) The Court erred in assuming jurisdiction with respect to causes of action not arising under NY CPLR 302(b).

The grounds of this motion are stated in the attached affidavits and in the accompanying memorandum.

Pursuant to FR Civ P 59, defendant requests that

Motion for New Trial, Etc. Under Fr. Civ. P. 52(b) and 59

a date be set for oral argument, after fixing a time within which defendant may file reply affidavits.

Dated: January 10th, 1974.

WEIDLICH & ROGERS

By_____
CLIFTON F. WEIDLICH,
a Partner,

Attorneys for Defendant,
300 Madison Avenue,
New York, N. Y. - 10017

(MU 2-1446)

TO:

LEIGHT, DRIMMER & WEINSTEIN, ESQS.,
Attorneys for Plaintiff,
36 West 44th Street,
New York, N.Y. - 10036.

AFFIDAVIT OF CLIFTON F. WEIDLICH, JANUARY 10, 1974, IN SUPPORT OF DEFENDANT'S MOTION FOR NEW TRIAL, ETC.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK
(Same Title)

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

CLIFTON F. WEIDLICH, being duly sworn, says:

1. I am an attorney, represent the defendant, and have been a member of the New York Bar and of the Southern District Court Bar since 1928.

2. I make this affidavit in support of defendant's motion for a partial new trial and to set aside and amend certain findings and conclusions of law and the judgment entered herein on January 3rd, 1974.

3. The motion is brought on pursuant to Federal Rules of Civil Procedure, 52(b) and 60.

4. A partial new trial is sought by defendant on the finding of fact by the court that defendant "changed her residence" from New York in June 1967. Throughout this litiation, plaintiff has contended that defendant's acquisition of title to another residence in Nevada in 1967 ipso facto made her a non-resident of New York for the purpose of tolling the 6-year statute of limitations (CPLR 207, Clause 2).

5. See plaintiff's trial brief at pages 13, 14, 17 on the contention that defendant's mere acquisition of

another residence outside New York per se tolled the statute of limitations.

6. Defendant's counsel was taken by surprise by the decision, which apparently accepted the contention of plaintiff as to non-residence and imposed the burden of proving her presence in New York after June 1967. In the context of service of process Dean McLaughlin has said:

> "A person may have many residences, i.e., places where he lives, but he may have only one domicile: the place he regards as his 'home'."

7. Consequently after receipt of the decision herein I immediately called Miss McGuire at Las Vegas, who was ill at the time, but was then given the name of Fred Alexander, whose affidavit as to defendant's not moving from New York in June 1967 or prior to October 1968 is attached to this motion.

8. In addition deponent requests permission to submit defendant's original contracts of her performances in 1967 and 1968, to some of which she testified on the trial, marked as Exhibit B for Identification, but which were inadvertently omitted from the Exhibits submitted by counsel at the close of the trial.

9. Such contracts together with the testimony of defendant and her secretary will establish that defendant in the period after June 1967 was never absent from New York for more than four continuous months. These contracts AGVA and AFTRA, variety and television and radio performances, were testified to in part by defendant when called as a witness on plaintiff's case, but such testimony was discontinued at the Court's suggestion. Through oversight it was not resumed as part of defendant's case. It is of crucial significance in view of the burden of proof imposed on her as to her absence from New York.

10. Copies of the first page of each contract have been made to show the dates of engagement in or out of New York and Las Vegas and will be served upon plaintiff. Incidentally, plaintiff's counsel in the course of defendant's deposition, in two parts, requested that he be furnished with the contracts for the years 1966, 1967 and 1968.

11. As defendant's attorney I wish to explore the issue of the rendition to defendant of a handwritten invoice or bill, dated May 1962, in the amount of $2,641.95. Although the second largest item in plaintiff's claims, the paper was not furnished to me until October 1973 on the eve of trial. See Exhibit 1 No. 45).

CLIFTON F. WEIDLICH

CLIFTON F. WEIDLICH

Sworn to before me this)
)
10th day of January, 1974.)

Edith Tutelaly

EDITH TUTELAY
Notary Public, State of New York
No. 41-0414000
Qualified in Kings County
Certified in New York County
Commission Expires March 30, 1974

AFFIDAVIT OF FRED ALEXANDER, DECEMBER 24, 1973, IN SUPPORT OF DEFENDANT'S MOTION FOR NEW TRIAL, ETC.

UNITED STATES DISCTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Same Title)

STATE OF NEVADA)
:
COUNTY OF CLARK) ss.:

FRED ALEXANDER, being duly sworn, deposes and says:

1. I am a general contractor, licensed in the States of Nevada and California, and reside at 350 Rancho Drive, Las Vegas, Nevada.

2. I know the defendant, Phyllis McGuire, whose present residence in Las Vegas at 100 Rancho Circle is near mine.

3. Miss McGuire employed me to do remodeling, lighting installation, cement resoration, to build a tennis court and work on two swimming pools and a reflective pond in accordance with local regulations.

4. In July, 1967 I started work on the property, consisting of two houses and extensive grounds, Miss McGuire having purchased the premises the preceding June.

5. These jobs and incidental ones required my presence on the premises every day except Sunday from July, 1967 until January, 1968. During that period while I was actually on the premises I seldom saw Miss McGuire for she was not living there. When I had to speak to her about my work I called her apartment in New York City. Such calls, at least two a month, were made to the New York apartment from the summer of 1967 until my last bills went out in the summer of 1968.

On occasion I spoke with Miss McGuire or her secretary when she was not in. In that event the calls would be returned later by Miss McGuire.

6. At the request of defendant's attorney, Clifton F. Weidlich, I have searched my records to fix the exact dates of my calls to New York but find that Miss McGuire gave me and my mother her telephone charge card that was used by us on calls to the New York apartment. My mother, Eileen Alexander, was attending to local Las Vegas bills of Miss McGuire in the summer and fallsof 1968 in the absence of Miss McGuire. Among the items, I am informed and believe, was one in the neighborhood of $4500 for moving charges incurred by Miss McGuire.

7. To the best of my recollection it was in the late summer of 1968 that I saw two moving vans unload at 100 Rancho Circle. Miss McGuire was not present but her housekeeper, Miss Jobe, supervised the unloading of clothing and household furnishings.

8. In 1968 when my work did not require daily attendance at 100 Rancho Circle I was permitted to use Miss McGuire's tennis court. I often played there and as aresult can state that prior to October, 1968 when her personal belongings and furnishings were moved in, ~~did~~ she DID stay in her house for more than several days at a time. Throughout that period Miss McGuire occupied her home in Las Vegas but infrequently when her engagements there at Caesar's Palace and elsewhere were performed.

fa. NOT fa.

Fred Alexander

FRED ALEXANDER

Sworn to before me this
24th day of December, 1973.

Joanne R. Bullock

Notary Public

JOANNE R. BULLOCK
Notary Public—State of Nevada
COUNTY OF CLARK
My Commission Expires Jan. 19, 1975

AFFIDAVIT OF ISIDORE DRIMMER, SWORN TO ON JANUARY 28, 1974, IN OPPOSITION TO DEFENDANT'S MOTION FOR NEW TRIAL, ETC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Same Title)

STATE OF NEW YORK)
SS.:
COUNTY OF NEW YORK)

ISIDORE DRIMMER, being duly sworn, deposes and says:

I am a member of the firm of LEIGHT, DRIMMER & WEINSTEIN, attorneys for the plaintiff herein and make this affidavit in opposition to the defendant's motion for a partial new trial and to set aside and amend certain findings of fact, conclusions of law and the judgment entered herein on January 3, 1974.

The defendant has failed to allege any factual data unavailable to the defendant prior to the trial of this action that warrants the amendment of the findings of fact and the conclusions of law.

To warrant a new trial on the ground of newly discovered evidence, the evidence must not only have been unknown to movant at the time of trial, but also the movant must have been excusably ignorant of the facts so that they could not have been discovered by diligent search (Ionian Shipping Co. v. Tyson Shipping Co., D.C.N.Y. 1969, 49 F.R.D. 324). The evidence must be material and not cumulative or impeaching (U.S. v. Perea, C.A.N.M. 1972 458 F. 2d 535, U.S. v. 41 Cases, C.A. Tex. 1970, 420 F. 2d 1126) and are not favored (Mittlieder v. Chicago and N.W. Railway Co., C.A. Neb. 1971 441

F.2d 52).

Defendant has failed to set forth any excusable reason why Fred Alexander was not produced at the trial. His projected testimony would at best be cumulative to the testimony rendered by Miss McGUIRE and Miss Job on the trial of this action. Such testimony also is not documented and is based upon his best recollection.

The fact that defendant's counsel was taken by surprise by the decision which apparently accepted the contention of plaintiff as to non-residence is not a sufficient ground for a new trial. The affidavit in support of the motion recites that the defendant was taken by surprise by th e decision. He does not allege that he was surprised by the testimony. Even if the record showed reasonable genuine surprise on the part of the defendant due to the evidence introduced by the plaintiff, his failure to ask for a continuance to allow him to prepare for presentation of rebuttal testimony and permitting the cause to go to judgment should not thereafter be grounds for an opening of the issues by the granting of a new trial.

(Moylan v. Siciliano, C.A. Guam, 1961, 292 F. 2d, 704.)

The contracts of AGVA and AFTRA not introduced in evidence through oversight have no effect upon the decision herein. These contracts merely indicate that during the dates there indicated that the defendant performed in the places indicated in the contract. In fact, the introduction of these contracts in evidence would strengthen the fact that the defendant was a resident of Las Vegas, Nevada rather than New York. The testimony given by both Miss McGUIRE and Miss Job was that after each engagement out of the State of New York, the defendant returned to New York and remained there until the next engagement. The Court did not credit this testimony. The contracts

defendant is proposing to offer in evidence would discredit defendants.

Paragraph 24 of the contract dated April 24, 1968 provides that the defendant who was to perform in Nashville, Tennessee would receive at no cost to her one first class round trip air fare between Las Vegas, Nevada and Nashville, Tennessee.

The contract dated March 20, 1968 between JohnnyCarson and the defendant which calls for four weekend performances in Maryland provides for the defendant to receive the equivalent of one round trip jet air fare "from Las Vegas, Nevada to New York and return to Las Vegas, Nevada, in connection with each of the weekend assignments". This seems to contradict the testimony rendered by the defendant and Miss Job, that she returned to the New York apartment immediately following each engagement. In addition, the introduction of the contracts in evidence would not add to the specificity about the amount of time defendant spent in New York.

Deponent does not recall that this Court suggested that the defendant discontinue the offering of any testimony with respect to the said contracts.

Plaintiff therefore respectfully prays that th e defendant's motion be denied in its entirety.

ISIDORE DRIMMER

Sworn to before me this

28th day of January, 1974.

ROBERT A. GERSHUNY
Notary Public, State of New York
No. 60-1414475
Qualified in Westchester County
Commission Expires March 30, 1975

REPLY AFFIDAVIT OF CLIFTON F. WEIDLICH, SWORN TO ON FEBRUARY 19, 1974, IN SUPPORT OF DEFENDANT'S MOTIONS UNDER FR. CIV. P. 52(b) AND 59

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

(Same Title)

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

CLIFTON F. WEIDLICH, being duly sworn, says:

1. I am one of defendant's attorneys and make this reply affidavit in support of defendant's motion pursuant to FRCP 52 and 59.

2. This is a court action in which defendant, before entry of judgment, made a timely motion for partial new trial and to amend and alter the findings of fact and conclusions of law set forth in the court's opinion. Consequently, proper relief may be granted by something less than a full new trial, such as the taking of additional testimony, amendment of findings, conclusions or judgment.

Moore's Manual, p. 1733.

Phelan v. Middle States Oil Corp., (CA 2d, 1954) 210 F 2d 360.

Ryans v. Blevins, 159 F. Supp. 234.

3. Moreover, once a timely motion under Rule 59 has been filed, the court may in the exercise of judicial discretion allow the moving party to state additional grounds for granting the motion (Alcaro v. Jean Jordeau, Inc. (D NJ 1942) 3 FRD 61, rev'd on other grounds 136 F 2d 767. In defendant's Reply Memorandum New York decisions

(45)

are cited to the effect that the six-year limitation is not tolled by defendant's absence from New York (CPLR 302(a)(1) on account of CPLR 207(3), which makes tolling provisions inapplicable while personal jurisdiction over defendant may be obtained without personal service in New York.

Marcus v. Slenker, 20 NY 2d 820 (1967).

Burris v. Alexander, 51 M 2d 543, 273 NYS 2d 542 (1966).

This argument and those authorities were not pressed or cited in our Main Memorandum, although the argument was advanced on the trial on defendant's motion to dismiss.

4. Plaintiff has submitted no memorandum on the law so far and opposes both branches of defendant's motion largely on the ground that Fred Alexander's testimony would be merely cumulative, is not documented and no reason is given for the non-production of his testimony at the trial. I was taken by surprise by the decision's acceptance of defendant's dual contentions of non-residence in New York after June 1967 and of the imposition of the burden of proof on defendant to show presence in the state as a result of removal (Opinion, pp. 6-8). It was my long considered belief that defendant's absence from New York for four continuous months, and not mere non-residence alone would toll or suspend the six-year statute of limitations. Accordingly, I did not suppose that Mr. Alexander, in 1967 and still a resident of Las Vegas, had actual knowledge of Miss McGuire's physical presence in New York.

5. As long ago as almost the inception of this action, plaintiff in her demand for admission of facts asserted that defendant was a non-resident of New York in 1966, 1967, 1968 and 1969, but prior to August 26, 1969. To call Mr. Alexander as a witness as to the occupancy of

defendant's New York apartment and her absences as a performing artist from New York in those years did not appear to me material to defendant's defense.

6. Attached hereto is a copy of advice of charge of $5,626.04 made to the account of Phyllis McGuire with the First National Bank of Nevada at Las Vegas for cashier's Check No. 53287 on October 9th, 1968 to United Van Lines. Reference thereto was made by defendant on the trial but was not substantiated by this documentary evidence.

7. Defendant's testimony as to original AGVA (American Guild of Variety Artists) and AFTRA (American Federation of Television and Radio Artists) contracts did not extend to the year 1968. Consequently, the seeming contradiction mentioned on pages 2 and 3 of the Drimmer affidavit is wrong. Furthermore, in that same year a contract with Johnny Carson, dated February 6th, 1968, provides for payment to the Artist (defendant) of one first class round-trip air fare between New York and Miami, Florida.

8. On defendant's deposition production of the AGVA and AFTRA contracts were requested by plaintiff's counsel; when produced he declined to examine them. Those dated in 1967 and 1968 (before October 1st, 1968) are clearly material on the quantum of time spent by defendant in New York after June 1967. Other contracts, not here submitted, can be verified by other records of Miss McGuire, such as her Fan Mail Diary.

9. I have ordered and paid in advance for the transcript of the trial testimony and evidence and respectfully refer the court thereto on any questions of fact.

10. Copy of handwritten invoice of plaintiff,

dated May 1962, is attached hereto. On the actual date of delivery and to whom, I wish to inquire of plaintiff and others. It is found in Plaintiff's Exhibit One (numbered 45) but was not furnished to me until October 30th, 1973 on the eve of trial whereas copies of some forty-odd other invoices were given to me considerably prior thereto by plaintiff's attorneys.

11. Attention is called to the recent decision of the New York Supreme Court, Westchester County, in Matter Schoenholtz holding:

> "This court is not of the opinion that the mere forwarding of a hospital invoice constitutes a demand of payment."
>
> (N.Y.L.J., Jan. 17, 1974, Supreme Court, Westchester County, Slifkin, J.).

12. At page 7 this court stated that defendant contended that plaintiff could have served her under the long-arm statute or by some form of substituted service, N.Y. CPLR 308(5). It had no antecedent in the CPA and was designed to afford special types of service when all avenues were exhausted. A basis of jurisdiction must exist (which did here by virtue of 302(a)(1)) for it is purely a notice statute.

> McLaughlin, Commentaries, McKinney, Vol. 7B, p. 308.

Apparently this section was available to plaintiff after 1963 as well as the substituted service provisions in subdivision 4, but such form of service could not be made without due diligence. Furthermore, by virtue of CPLR 301, the substituted service under CPA 230, 231 was not closed to plaintiff.

> Dobkin v. Chapman, 21 N.Y. 2d 161, 236 N.E. 451 (1968).

Beyond any doubt the court on ex parte applica-

tion could devise a method of notice service upon such a well known person as Miss McGuire.

13. The following corrections and addenda in our main brief are:

(1) Page 16 l. 8 -- 302 (a)(1);

(2) Page 20, in line 1, 1973 should be 1974;

(3) Change Invoice dated 12/26/61 to invoices dated Dec. 23 and Dec. 26, 1961 (Ex. One, numbered 8 and 9-10).

CLIFTON F. WEIDLICH

Sworn to before me this)
19th day of February, 1974.)

[illegible] NITTOLY
[illegible] State of New York
[illegible] County
[illegible] County
[illegible] Ex. 30, 19 74

ORDER OF LUMBARD, C.J., DENYING MOTIONS UNDER FR. CIV. P. 52(b AND 59

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Same Title)

LUMBARD, Circuit Judge:*

Defendant has moved this court pursuant to F.R.Civ.P. 52(b) and 59 for a partial new trial and/or amendments to the findings of fact and conclusions of law contained in the opinion of December 13, 1973.

Defendant counters the court's finding that she did not meet her burden of proof in showing that she was not absent from New York by offering to introduce new evidence. She says that she did not introduce this evidence because her counsel was surprised at the court's ruling that she had the burden of proof on this issue. This argument lacks substance. The parties had both submitted memoranda before trial which argued that the other side had the burden of proof.

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* Sitting by designation.

The court relied on the very case that plaintiff cited. It is difficult to see how defendant can claim that she was surprised by the ruling. Before a new trial can be granted on the grounds of newly discovered evidence, it must be shown that the party seeking the new trial could not have introduced the evidence at the original trial even in the exercise of due diligence. Wright & Miller, Federal Practice and Procedure § 2808 (1973). Here there is no showing of due diligence. Therefore, the motion for a new trial is denied.

Defendant next seeks to amend the findings on the grounds that the court reached several erroneous conclusions of law. The major contention is that the court erred when it said that N.Y.C.P.L.R. § 207(3) did not apply in this case because it was passed after the causes of action allegedly barred by the statute of limitations had accrued. Defendant claims that § 218(b), which allows actions accrued before September 1, 1963, to be brought under whichever statute of limitations, either old or new, allows the action, applies only to provisions barring actions not brought within a certain number of years and not to tolling provisions. For this she cites a commentary by Dean McLaughlin to N.Y.C.P.L.R. § 302 and two cases. Dean McLaughlin's views, while entitled to some weight, are not definitive, and the cases are not directly on point. In Marcus v. Slenker, 20 N.Y. 2d 820, 284 N.Y.S. 2d 710 (1967), the Court of Appeals held without opinion that the statute of limitations had in fact been tolled, although the trial court in the case indicated that § 207(3) applied to actions which accrued before 1963. Burris v. Alexander Manufacturing Co., 51 Misc. 2d 543,

273 N.Y.S 2d 542 (1966), was a decision by a trial court interpreting Tennessee statutes allegedly analogous to New York law.

While these authorities tend to support defendant's position, the court is not bound to follow them. The purpose of § 218(b) is to allow the action unless it is barred by both the old and the new statutes of limitations. Certainly the tolling provision is an integral part of the statute of limitations. There is no good reason not to apply the transitional provisions of § 218(b) to the tolling provision as well as the provisions requiring that actions be brought within a certain time.

Defendant's other claims of error have been considered and are without merit.

Accordingly, the motions are in all respects denied.

SO ORDERED:

/s/ J. Edward Lumbard

J. EDWARD LUMBARD
Circuit Judge
(Sitting by designation)

Dated: February 27, 1974.

DEFENDANT'S MOTION FOR RE-ARGUMENT AND STAY, WITH AFFIDAVIT OF CLIFTON F. WEIDLICH OF MARCH 11, 1974, DENIED BY MEMO ENDORSED

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

(Same Title)

Defendant moves the court for reargument of her motion heretofore made under FRCP 52 and 59 and denied by order and memorandum of the court (Lumbard, C.J.) on February 27th, 1974. In connection therewith defendant prays that a stay of execution be granted until the hearing and determination of this motion.

The grounds of this motion are stated in full particular in the accompanying affidavit of Clifton F. Weidlich.

A time for the hearing of the motion at the court's convenience is requested on or after March 18th, 1974, at 11:00 A.M., at the Judge's Chambers, United States Court House, Foley Square, New York, N.Y.

Dated, New York, N.Y.,
March 11th, 1974.

WEIDLICH & ROGERS

By_____
CLIFTON F. WEIDLICH, Partner.
Attorneys for Defendant,
300 Madison Avenue,
New York, N.Y. - 10017.
(MU 2-1446).

TO:

Leight, Drimmer & Weinstein, Esqs.,
Attorneys for Plaintiff,
36 West 44th Street,
New York, N.Y. - 10036.

(49)

Defendant's Motion for Re-Argument and Stay, with Affidavit of Clifton F. Weidlich of March 11, 1974, Denied by Memo Endorsed

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

CLIFTON F. WEIDLICH, being duly sworn, deposes and says:

1. As one of defendant's attorneys, duly admitted to practice before this Court in 1928, and to the Supreme Court of the United States in 1930, I make this affidavit in support of our client's application for reargument of her motions, which we made under F.R. Civ. P 52(b) and 59, and both of which were denied in toto by order of this Court entered herein on February 27th, 1974.

THE RULING THAT THIS U.S. DISTRICT COURT IS NOT BOUND TO FOLLOW PERTINENT NEW YORK DECISIONS IN THIS DIVERSITY ACTION NON OBSTANTE ERIE R. CO. v. TOMKINS.

2. The memorandum-order of Circuit Judge Lumbard (sitting by designation on the trial of the instant action) states that while these authorities (State Court decisions cited by defendant) -

"tend to support defendant's position, the court is not bound to follow them."

3. That conclusion seemingly was reached as to Marcus v. Slenker (20 N.Y. 2d 820, 1967) because the New York court of last resort decided it without opinion; as to

Burris v. Alexander (51 Misc. 2d 543, 1966) because it was a nisi prius decision "interpreting Tennessee statutes allegedly analogous to New York law" (Memorandum, pp. 2-3).

4. The landmark case, Erie Railroad Co. v. Tompkins (304 U.S. 64), decided in 1938, overruled the doctrine pronounced in Swift v. Tyson (16 Pet. 1) almost a century before. Speaking through Brandeis, J., the Court abandoned the prior doctrine of Swift v. Tyson looking to consistency or uniformity of decisions in Federal Courts throughout the country. Absent a governing Federal statute or constitutional provision, the Court held that the true uniformity of justice to be sought was consistency on the same rule of decision within the state where the litigants were at issue, whether in a State or Federal court (304 U.S. 64, at 78).

5. The new New York Civil Practice Law & Rules, replacing the old Civil Practice Act and Rules of Civil Practice, achieves measureably more uniformity of procedure in the various state courts than any of the three predecessor acts (Weinstein-Korn-Miller, ¶101.05).

6. Under both the new New York Laws and the old Practice Act appeal practice in the intermediate Appellate Division and in going to the Court of Appeals is much more complex than, say, in Connecticut, where no intermediate court exists between the general trial court (Superior) and the highest court (Supreme Court). There the general requirement is that only final judgments or orders are appealable. In New York, on the other hand, almost any and all orders are appealable to the intermediate Appellate Division of the Supreme Court.

7. For many years in New York the sole method of appeal [on non-constitutional questions] to the Court of

Appeals from a non-final determination of the Appellate Division was, and still is, by leave granted by the Appellate Division (CPLR, 5602(b), Cohen & Karger, Rev. Ed., §82 n. 13). Although certain appeals from final judgments and orders not allowed as of right, may be granted by both the Appellate Division and the Court of Appeals, the lower Appellate Court rarely, if ever, grants permission to appeal. Presumably, this policy is followed in the belief that the Court of Appeals can better judge whether an appeal should be allowed.

8. The practice in review by the Court of Appeals of non-final determinations of the Appellate Division requires the latter court to certify all questions of law it may have to the higher court. Despite permission granted, the appeal will not be entertained unless questions are certified (Cohen & Karger, Powers of the New York Court of Appeals §85).

9. In the light of this rudimentary sketch of New York State appeal practice, we look at Marcus v. Slenker, 20 N.Y. 2d 820, 284 NYS 2d 710, cited by defendant in her reply brief as a controlling New York State court decision. Handed down in 1967, when Miss McGuire, the defendant herein, concededly acquired another home in Nevada, that Court of Appeals' ruling is deemed of no binding effect upon this trial federal court, since -

> "the Court of Appeals held without opinion that the statute of limitations had in fact been tolled, although the trial court in the case indicated that §207(3) [CPLR] applied to actions which accrued before 1963."

10. I cited that decision in our reply brief and quoted the ruling of the Court of Appeals as set out in the memorandum of opinion; in addition I said on page 3 of the brief that the Appellate Division had unanimously affirmed,

without opinion, an order made at Special Term, per Hecht, J.; further, it had certified to the Court of Appeals the question: "Was the order of Special Term proper?" I believe that such form of certification is still in order.

11. This District Court, I respectfully submit, inaccurately ruled that the statute of limitations in Slenker (supra) had been tolled and it irrelevantly referred to Mr. Justice Hecht's ruling to the effect that 207(3) applied to actions accruing before 1963. There the appeal was allowed and taken from the order of the Appellate Division and not from that of the Supreme Court. The only question before the Court of Appeals was the propriety of the order of the Appellate Division, unanimously affirming the order made below at Special Term. The question certified to the Court of Appeals by the intermediate appellate court whether the court of first instance had ruled correctly was answered "yes".

12. In fact the three-year period of limitation in Marcus was partially tolled, but was not completely barred, for twenty months, when the three-year statute resumed running on September 1st, 1963. After that date jurisdiction under CPLR 302 (long-arm statute) could have been obtained over defendant without personal service in New York and the CPLR made tolling provisions inapplicable while such jurisdiction could be obtained (CPLR 207(3)).

13. While granting the motion for leave to appeal its determination to the Court of last resort, the Appellate Division naturally refrained from writing an opinion on the question of law it certified for opinion. So it wrote no opinion in Marcus, but the lack of an opinion in no sense detracts from stare decisis.

14. Turning to the second case cited by defendant

in her reply brief (Burris v. Alexander Mfg. Co., 273 N.Y.S. 2d 542), it also met with this court's disfavor supposedly because it was a trial court decision of the New York Supreme Court "interpreting-Tennessee statutes allegedly analogous to New York law." (Memo of court, pp. 2-3).

15. The second clause of CPLR 207 (continuous absence from New York for four months or more) is applicable to both resident and non-resident defendants.

Meyers v. Credit Lyonnaise, 259 N.Y. 399 (1932). The clause is also applied to causes of action which have accrued outside New York. In such cases CPLR "borrows" the limitations' statute of the foreign state, where CPLR incorporates a foreign limitation into New York law as an additional limitation, it incorporates the foreign tolling provision with it. This was done in Burris, but not as an interpretation of Tennessee statutory laws allegedly analogous to New York law. By virtue of CPLR 202 the New York Supreme Court was duty bound to construe the foreign state's statute of limitation, the tolling period thereto and the long-arm statute under which the action was brought in New York. Regretably, this peculiarity of New York's conflicting procedure was not mentioned in defendant's Reply Brief.

Burris v. Alexander Mfg. Co., 51 M 2d 543, 273 NYS 2d 542.

Daigle v. Leavitt, 54 M 2d 651, 283 NYS 2d 328 (1967).

Prouty v. Drake, 18 M 2d 887, 891-2, 152 NYS 2d 271, 276-7 (1959).

Weinstein-Korn-Miller, Vol. 1, ¶207.03.

16. In view of the "borrowing" statute of New York it cannot be properly said, as this court did, that the statutes of a foreign state, similar to New York "law", were interpreted by our Supreme Court.

17. Both of the cited cases (Marcus in the New York Court of Appeals and Burris in the New York Supreme Court, were instituted under long-arm statutes, as was the case at bar. In both cited cases the statutory period resumed running after the long-arm statute and CPLR 207(3) became effective. So, here, the six-year period, which started running in 1961 continued to run without interruption until August 26th, 1969, when process was delivered to defendant in Nevada. In the case at bar there was no resumption of the statutory period, since no tolling thereof had commenced before the new New York CPLR took effect. Since defendant was without question both a resident and domiciliary until June 1967, it was not possible to toll the limitation period prior thereto. As Dean McLaughlin well said: "An important by-product of the holding that CPLR 302 is retroactive, is that the statute of limitations against non-domiciliaries /Miss McGuire in this instance/ . . . . resumed running on September 1st, 1963 and no further toll is available." (p.2, Defendant's Reply Brief). Of course, it is to be noted that in the case at bar there was no resumption since defendant did not leave New York before September 1963. Thereafter, by virtue of CPLR 207(3) and (302) no toll was available to plaintiff.

18. Thus, it is earnestly submitted, on defendant's behalf, that the mere lack of written opinions in the cases cited by her is a factor of no weight in the decision of this case. For generations our Court of Appeals has left procedural questions to the determination of the Appellate Division. In the span of a decade since the adoption of CPLR there has been to my knowledge no written opinion by the Court of Appeals on these procedural matters.

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That omission, due to New York Appellate practice, however, is no warrant for a federal trial court to disregard and ignore either certified questions of law answered by the New York Court of Appeals or well considered opinions of the New York Supreme Court. They are stare decisis of the issues submitted. Under the Erie v. Tomkins doctrine they are substantive law in diversity cases in the Federal courts, irrespective of whether they were embodied in written opinions of the Court of Appeals or not.

19. Even before Erie the federal courts followed the decisions of intermediate state courts on the application of state statutory and local law, in the absence of a decision on the question by the highest state court (Blair v. Commissioner, 300 U.S. 5). Citing cases, Prof. Moore says that the Supreme Court indicated it would continue that policy after Erie (Moore's Manual, § 4.24[27]).

In Fidelity Union Trust Co. v. Field (311 U.S.169, 1940) the Court held that the federal courts were bound to follow state law as announced by a nisi prius court in New Jersey (Moore's Manual, ibid.). We need not trace in detail the application of the Erie doctrine for the state statutory construction in Marcus is that of our highest state court. The fact that the Appellate Division, without opinion, granted leave to appeal on a certified question as to the ruling made at nisi prius (Special Term) does not wipe out the decision of the Court of Appeals or render it without the effect of stare decisis.

In King v. Order of United Commercial Travelers, 333 U.S. 153, an inferior trial court decision, not reported statewide, was not followed in the Court of Appeals, Fourth Circuit. A further ground of rejection of the decision as state law was that the decision was not binding in any state

court. Of course, that result is a non sequitur with respect to the Burris case decided in the Supreme Court of the State of New York. Moreover, the Supreme Court of the United States said in that case:

> "Nor is our decision to be taken as promulgating a general rule that federal courts need never abide by determinations of state law by state trial courts. As indicated by the Fidelity Union Trust Co. case, other situations in other states may well call for a different result."

20. Already this court has relied twice on the Appellate Division decision in McAvoy v. Harron (26 A.D. 2d 452). Actually, that case went to the Court of Appeals and was affirmed without opinion (21 N.Y. 2d 821, 235 N.E. 2d 910) but this learned court appears to have been unaware of the affirmance. See Opinion, pp. 7-8 and Memorandum denying rehearing, p. 2, top.

21. The court's novel argument, made at page 3 of its memorandum-order, does not stand up. It is that §218(b) allows the action "unless it is barred by both the old and new statutes of limitation." Not only is there no such word "allows" contained in the cited provision, but the old and new statutes are the same -- six years, and therefore the action is barred by both statutes, absent a valid toll. In veritable fact the statute makes applicable whichever limitation period is longer. In other words, where the periods differ under the CPA and CPLR, the longer one governs. The plain purpose and design of the transitional provision, 218(b), is clear today a decade after it became law. Dean McLaughlin succinctly stated that its promulgation was to avoid any constitutional problems that might arise if the limitation period on existing causes of action were suddenly abbreviated (defendant's Reply, p. 6).

22. To answer the court's observation that there

is no good reason not to apply the 218(b) transitional statute to tolling provisions or to the various exceptions to the many statutes, the stark fact remains that the Legislature of New York did not refer either to tolling or exceptions. It said nothing as to tolling for non-residence, for absence or for such exceptions as evasions of service by the use of false names or as the result of infancy, insanity, etc.

THE BURDEN OF PROOF AS TO TOLLING

23. The court has misunderstood, or misstated, defendant's contention on the burden of proof as to the tolling of or exception to the six-year period of limitation. In the memorandum-order of February 27th, 1974 (p. 1) it states that defendant did not sustain the burden of proving a double-negative of fact, viz., "she was not absent from New York". Further, that I as her counsel asserted surprise at such imposition of proof, which claim is given no credence because both parties had argued before trial on the issue and the court relied on the very case that plaintiff cited.

24. In my moving affidavit (par. 4) I pointed to plaintiff's trial brief and to three pages, where plaintiff contended that defendant's acquisition of another residence outside New York, not her continuous absence therefrom for four months, the statutory language, tolled the statute. Incidentally, the parties were directed last summer by a Magistrate to serve and file trial briefs on August 13th, 1974, which defendant did. Plaintiff served no brief until two weeks after trial on November 27th, 1974. As stated, in that brief plaintiff continued to press the argument that another residence outside New York, as this court found,

tolled the statute.

The following colloquy at the close of the trial supports, I believe, my surprise at the imposition of the burden on tolling:

> The Court: You say even though this is a defense you raise, the burden is on the plaintiff?
>
> Mr. Weidlich: No, the burden as to the exception of the statute of limitations -- the burden is on him.
>
> The Court: That is not my question. My question is, who has the burden of establishing that a claim is barred by the statute of limitations. I think the party making the claim.
>
> Mr. Weidlich: That is true but the cases are very clear when it comes to tolling the statute --
>
> The Court: That is something else. Please answer my question.
>
> Mr. Weidlich: Oh, the burden is on defendant to show that the claim is barred by the statute of limitations.
>
> The Court: When it comes to whether the statute was tolled, that would be on the plaintiff.
>
> Mr. Weidlich: Yes.
>
> The Court: Mr. Drimmer, do you agree with that?
>
> Mr. Drimmer: Yes, to some extent, I will agree to that fully except that in this case -- and I think I can cite cases that will show that it is up to the defendant to show -- the burden is upon the defendant to establish that the plaintiff had knowledge where the plaintiff could be served.
>
> Mr. William Weidlich: Not where the plaintiff could be served.
>
> Mr. Drimmer: Where the defendant could be served.
>
> Mr. William Weidlich: I am sorry to interrupt.
>
> Mr. Drimmer: Yes, I think I can establish cases on that. In all other respects I would say the burden of establishing the tolling is on the plaintiff, with the exception of the fact that the defendant has the burden of establishing that the plaintiff had knowledge of the defendant's whereabouts.

(Minutes, 287-289).

In the face of this trial concession by plaintiff on the burden of proof as to tolling of or exceptions to the

statute, I was indeed surprised by the finding that Miss McGuire's new and additional residence, but not domicile, in Las Vegas worked a shift of the burden of proof on her.

25. The court did not reach the issue on Miss McGuire's knowledge of the plaintiff's state of mind as to defendant's whereabouts in and after June 1967. Generally, a fact solely within a party's sole knowledge is not a fact which the other side must put in evidence. The Appellate Division of the Supreme Court in an identical situation has held it unnecessary to answer that question (Nelson v. Fraboni, 38 A.D. 633, 326 N.Y.S. 2d 934). This case I cited to the court by my letter of February 22nd, 1974 but did not discuss it. Probably the decision denying the motion was dictated before arrival of the letter, for no reference thereto was made by the court.

26. In Nelson v. Fraboni, the Supreme Court denied defendant's motion to dismiss based upon the statute of limitations. On appeal the Appellate Division reversed and held the three-year statute was not tolled during defendant's absence for eleven months even though a question of fact existed as to whether her whereabouts during that period were open and notorious. Said the court:

> "Defendant claims that the Statute was not tolled while defendant was absent from the State because such tolling is excepted under CPLR 207 where jurisdiction over defendant can be obtained without personal service on him within the State, as in the case of sections 253 and 254 of the Vehicle and Traffic law, CPLR 308 and CPLR 313. Special Term found questions of fact to be determined before a determination could be reached as to whether the Statute had run. We hold that even if those issues were resolved in favor of the plaintiff, the action is barred as a matter of law by the Statute of Limitations. There was no attempt made by plaintiff to use any of the available means to effect service on defendant in the instance case. CPLR 207 provides that 'If, after a cause of action has accrued against a person, he departs from the state and remains continuously absent therefrom for four months or more, * * * the time of his absence * * * is not a part of the time within which the action must be commenced.'

> The section does not apply, however, 1. while there is in force a designation, voluntary or involuntary, made pursuant to law, of a person to whom a summons may be delivered within the state with the same effect as if served personally within the state; or * * * 3. while jurisdiction over the person of the defendant can be obtained without personal delivery of the summons to him within the state".
>
> (Italics ours).

Continuing at page 936 (326 NYS 2d) the Appellate Division said:

> "Without a showing by plaintiff of at least an attempt to obtain service on defendant in the present case by use of the pertinent Vehicle and Traffic Law sections, or pursuant to CPLR 308 or CPLR 313, any one of which methods under the circumstances here would have been practicable, with the probability of actual notice reaching defendant, we conclude that defendant was at all times amenable to process. The Statute of Limitations, therefore, was not tolled while defendant was absent from the State. (Fuller v. Stuart, 3 Misc. 2d 456, 153 N.Y.S. 2d 188; Caruso v. Bard, 20 Misc. 2d 867, 194 N.Y.S. 2d 535; King v. Killum, 39 Misc. 2d 48, 239 N.Y.S. 2d 1013)."

Noting that this case was apparently instituted by service on defendant's husband, not handed to defendant, under CPLR 308(4) or (5), we turn to the record here as to plaintiff's effort, if any, to effect personal service upon defendant under 308(4), substituted service, under 302 or under 313 (personal service outside the State).

The short answer is none whatsoever. Plaintiff simply testified on direct: that, the last time she went to defendant's apartment, 525 Park Avenue, was in 1967; that in 1968 in the latter part of the year plaintiff was told that she (defendant) had moved, and "no longer lived there",

> "Q. Did you try to find out where Miss McGuire moved to?
>
> A. I tried by inquiring from the doorman.
>
> Q. Were you able to locate her?
>
> A. No."
>
> (Minutes, 94,95).

Plaintiff resumed the examination, said that she had two

attorneys and the latter, Mr. Drimmer, was able to locate defendant in Nevada (by reason of his theatrical connections) where process was served personally on her in August, 1969.

Admittedly, no effort was made to serve defendant either by substituted service (308(4) at defendant's New York apartment or by court order under 308(5) or under the CPA §§ 230, 231. Those methods are permitted only after a showing of due diligence to attempt personal service under 308(1). Since plaintiff never even attempted to go in 1967 or 1968 to the door of defendant's New York apartment, nor did her attorneys' process server, the showing of due diligence required under 308(1) is entirely absent. As in Nelson (supra):

> " * * no attempt [was] made by plaintiff to use any of the available means to effect service on defendant in the instant case."

Therefore, the court concluded that defendant was amenable to process despite her absence from the state and the statute was not tolled.

27. Directly in point and in accord with Nelson v. Fraboni is American Trading Co. Inc. v. Fish, n.o.r., decided by the Supreme Court, Fein, J. on or about February 19th, 1974, and reported in the New York Law Journal on February 21st, 1974, at page 16, col. 8. I discovered this case after submission of our reply brief on February 19th. The decision reads in pertinent part:

> "Plaintiff asserts that there was a toll of the statute of limitations pursuant to CPLR Sec. 207, because it allegedly took approximately six months to ascertain defendant's residence address in Illinois. However, since the contract was negotiated, entered into and subject by its own terms to the laws in New York, there was continuous jurisdiction over defendant. It is immaterial whether he was actually served personally within or without New York. Since he could have been effectively served without the State, the statute is not tolled (CPLR 207(3). Plaintiff's reliance upon Ellis v. Riley (53 Misc. 2d 615, aff'd 29 A.D. 2d 562) is misplaced. That case turned on the fact that the

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non-resident motor vehicle owner defendant was not amenable to service sufficient to support personal jurisdiction pursuant to Vehicle and Traffic Law, Sections 253, 254, because the driver had furnished an incorrect address for the owner in the accident report. When such a defendant is amenable to service, the statute of limitations is not tolled. (Goodemote v. McLain, 40 A.D. 2d 22; Nelson v. Fraboni, 38 A.D. 2d 633). Unlike these cases, the plaintiff here was never given an incorrect address for the defendant. Plaintiff was actually always in possession of the address at which defendant was ultimately served. Consequently, since the defendant could have been served pursuant to CPLR 308(5) or CPLR 313 and CPLR 308(4), the statute of limitations was not tolled (CPLR 207(3))."

(Emphasis supplied).

28. The Circuit Court of Appeals, Second Circuit, in 1940 did not feel constrained to follow the New York law as declared by a single judge, because it thought the law was incorrectly stated and against other precedent. Lockhart v. Garden City Bank & Trust Co., 116 F. 2d 658. The opinion, per Clark, C.J., at page 662, cites Fidelity Union Trust v. Fields, to the effect that that case did not make it duty bound for the Second Circuit to follow a decision declaring bad law. At about the same time, however, the same court reversed itself on rehearing when the New York Court of Appeals avoided approval of New York law as found by the Appellate Division (Wickes Boiler Co. v. Godfrey-Keller, 121 F. 2d 415).

I sincerely hope that these decisions are not relied upon by this court as a reason for not finding the two cited cases in the memorandum [illegible] binding. With the complications arising out of the CPLR, the staleness of the plaintiff's claim, and procedural obstacles, the defense of the action with a client over three thousand miles removed, has not been easy. One case, Marcus, a definitive adjudication of a non-final order made at Special Term, was unanimously affirmed and approved at both the intermediate

and final appellate stages. How the three-stage decisions of 12 judges, even without opinion or dissent, are not "directly on point" is unclear. The seeming differentiation (that the trial court indicated that §207(3) applied to actions which accrued before 1963), I respectfully submit, is no valid distinction. Defendant has never intended to argue that 207(3) did not apply to actions, wholly or partially accrued.

Moreover, the decision in that case was not after trial but was handed down in the then motion part of the Supreme Court. However, the correctness of the ruling was affirmed by both the Appellate Division and the Court of Appeals.

29. Of the two additional cases cited in this paper, one is the written opinion of the Appellate Division and that the other of the lower court of the State. I have already stated at length with respect to the trial court decision in Burris that it was a construction of both New York and Tennessee statutory law imposed upon it by reason of New York CPLR 202.

DEFENDANT AS A MEMBER OF THE CLASS OF NEW YORK DOMICILIARIES HAS BEEN DENIED EQUAL PROTECTION UNDER THE XIVTH AMENDMENT.

30. The rule was, and still is, I believe, that a constitutional violation under the 14th Amendment should be raised at the first opportunity. Accordingly, I now raise that objection on defendant's behalf on the following grounds:

This court has found that defendant changed her residence in June 1967, although she also maintained her New York apartment, paying the rent until October, 1968,

"which she used occasionally for a few days at a time." (Decision, p. 7). The finding is ambiguous in that it does not make defendant a non-domiciliary of New York in and after 1967.

Even if defendant acquired another residence outside New York in 1967, there is no finding or evidence that she abandoned her New York domicile at that time. Therefore, she then had two residences, one inside and one outside the State of New York.

In the increasingly numerous class of New York domiciliaries, possessing both town and country homes, defendant has been denied the benefit of CPLR 207, second clause, and deprived as a member of that class of dual homeowners of the equal protection clause (U.S. Constitution, 14th Amendment, Section 1).

Clearly, a New York domiciliary was and is subject to substituted service under the Code of Civil Procedure of New York, under the New York Civil Practice Act and under New York CPLR, 308. Furthermore, if a non-domiciliary, defendant was subject to service under the New York long-arm statute. Jurisdiction was actually obtained by that method over defendant in August 1969 (Decision, p. 1).

The trend toward wider application of the Equal Protection Clause appeared in 1969 in the area of public welfare (Shapiro v. Thompson, 394 U.S. 618, 22 L Ed. 2d 600); the Court held that a one year residency requirement for welfare recipients violated equal protection of the law.

In recent cases applicants for admission to the bar have challenged the court rules or statutes which set conditions of residency or citizenship; formerly specified requirements of residency and citizenship, as well as good moral character and education, were taken for granted. This

trend has been encouraged by two U.S. Supreme Court cases, Schware v. Board of Bar Examiners, (1957) 353 U.S. 232, 1 L. Ed. 2d 796 and Shapiro (supra).

Two years after the reversal of the Supreme Court of Connecticut in Boddie, 401 U.S. 371, the Court held last year that a court rule of the Superior Court of Connecticut, making U.S. citizenship a condition to admission to the bar, violated the equal protection clause of the Fourteenth Amendment, Section 1, (In re Application of Griffiths, 37 L. Ed. 2d 910). As a result the states can no longer constitutionally keep out of the legal profession a resident alien, having no intention to become an American citizen, who is otherwise qualified (53 ALR 3d 1167, 1168).

The trend of expanding coverage of equal protection of laws is further exemplified in recent U.S. District Court cases with respect to residency requirements:

Keenan v. Board of Law Examiners, (DC NC) 317 F. Supp. 1350 (1970).

Webster v. Wofford, (D.C. Ga.) 321 F. Supp. 1259 (1970).

Lipman v. Van Zant, (D.C. Miss.) 329 F. Supp. 391 (1971).

Potts v. Hon. Justices of Supreme Court (D.C. Hawaii), 332 F. Supp. 1392 (1971).

Perhaps the latest case on Equal Protection is DeFunis v. Odegaard, argued a couple of weeks ago in the Supreme Court on appeal from the Supreme Court of the State of Washington. The case involves the problem of admission to law school of members of certain classes of persons ahead of members of other groups who may be more scholastically qualified for admission. Appellant argued that such admission practice violates the Equal Protection clause.

31. Defendant requests a stay of execution under the judgment herein pending the hearing and determination

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32. No previous application for the stay requested herein has been made of any court or judge.

s/ Clifton F. Weidlich
CLIFTON F. WEIDLICH

MEMO END.

Motions for re-argument and stay denied in all respects.

March 18, 1974 s/ Edward J. Lumbard,
Circuit Judge

NOTICE OF APPEAL (Filed March 27, 1974)

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

(Same Title)

NOTICE is hereby given that PHYLLIS McGUIRE, defendant above-named, hereby appeals to the United States Court of Appeals for the Second Circuit, from the final judgment entered in this action on January 7th, 1974, and from the order denying defendant's motion, filed under FRCP 52(b) and 59 on January 14th, 1974, for a partial new trial and to amend certain findings and conclusions and judgment, which order was entered herein on February 27th, 1974.

WEIDLICH & ROGERS

By /s/ Clifton F. Weidlich

CLIFTON F. WEIDLICH,
Partner,
300 Madison Avenue,
New York, N.Y. - 10017,

Attorneys for Phyllis McGuire,
Defendant.

(MU 2-1446)

Dated: March 27th, 1974.

TO:
LEIGHT, DRIMMER & WEINSTEIN Esqs
Attorneys for Plaintiff
36 West 44th Street
New York, N.Y. 10036

* * *

Q In 1967 did you buy a house in Las Vegas?

A Not in 1967.

Q Are you sure?

A I believe it was in 1966.

Q In 1966 you bought a house in Las Vegas. Is that the one on Rancho Circle?

A Yes, sir.

Q The house in which you now live?

A Correct.

Q Miss McGuire, did you not take title to the house in Las Vegas at 100 Rancho Circle, Las Vegas, in 1967?

A It could have been. I thought it was 1966 but perhaps it was 1967.

THE COURT: Wait a minute. Will you read that question and answer.

(Record read.)

MR. DRIMMER: May I ask counsel to produce the

statement of account from the First National Bank of Nevada and the mortgage ledger of the Frontier Fidelity Savings and Loan Association in Las Vegas?

MR. WEIDLICH: Yes. I have a statement of the First National Bank October 16, 1967, and the mortgage ledger dated October 26, 1967 (handing to counsel).

Q May I show you these papers produced by your attorney and ask you whether this will refresh your recollection as to when you took title to the house on Rancho Circle in Las Vegas?

A This is correct.

MR. DRIMMER: Can we agree upon a date, Mr. Weidlich?

MR. WIDLICH: Yes, certainly. The deed was recorded on June 14, 1967.

Q Is it a fact that you engaged services of a maid, Mrs. Bussy, is that it, who worked for you in Las Vegas?

A It is news to me.

MR. WEIDLICH: Mary Bessie McNeil.

THE WITNESS: Yes.

Q Now, you engaged services of Mary Bessie McNeil to act as your maid in Las Vegas sometime in July of 1967?

A Yes, sir.

Q You lived at 100 Rancho Circle in July of 1967, is that correct?

A I could have.

Q Well --

A I am not sure where I was in July of 1967. If I had been appearing in Las Vegas I would. If I wasn't, I would have lived in New York. Bessie McNeill I used in the 1950s.

MR. DRIMMER: Mr.Weidlich, do you have the original of the answers to the interrogatories that were made by Miss McGuire?

MR. WEIDLICH: What is that?

MR. DRIMMER: The answer to notice to admit that was served upon us that was signed by Miss McGuire.

MR. WEIDLICH: No, that was filed.

MR. DRIMMER: Is the original file here?

MR. WEIDLICH: I can give you a copy of the amended response.

MR. DRIMMER: The original response.

MR. WEIDLICH: I wouldn't have the original; that has to be filed.

MR. DRIMMER: Let me have a copy of the first amended response, not this one shown me.

MR. WEIDLICH: I don't have that here. That has

been superseded by the amended response filed in October. It admits Miss McGuire maintained a residence in New York until October 1st, 1968.

MR. DRIMMER: Mr. Weidlich, there is no question before you. I hope your Honor will forgive me and bear with me. I will find it.

Will you mark this for identification, please.

(Plaintiff's Exhibit 4 marked for identification.)

BY MR. DRIMMER:

Q I show you Plaintiff's Exhibit 4 and ask you whether you signed the original of this.

MR. WEIDLICH: Yes, there is no question about that.

MR. DRIMMER: At this time I offer this paper in evidence. It is the anwwer to the -- I withdraw that.

MR. WEIDLICH: We concede sheestablished a residence in Nevada and that she also maintained her residence in New York.

MR. DRIMMER: Do you concede that in the answer to the notice to admit you stated the following:

"As to the other item asked I cannot at this late date, almost ten years after the claimed

delivery or services rendered truthfully admit or deny their delivery to my former New York apartment from which I removed in 1967."?

Do you concede that statement was made?

MR. WEIDLICH: No, we do not.

MR. DRIMMER: At this point I am going to offer this statement in evidence, Plaintiff's Exhibit 4.

MR. WEIDLICH: I object to that statement, that has been superseded by an amended response which is on file.

THE COURT: Is that under oath?

MR. WEIDLICH: That is under oath, the amended response.

MR. DRIMMER: And this was under oath.

THE COURT: Then we will take whatever either party wishes to offer.

* * *

* * *

BY MR. DRIMMER:

Q Miss McGuire, did you state that you removed from your New York apartment in 1967?

MR. WEIDLICH: I object. That is already in evidence.

THE COURT: Overruled.

THE WITNESS: I answer the question?

Q Yes. Yes or no.

A Yes.

Q Did you so state?

A I did so state but it is not so true.

Q Did you at that time, 1967, establish a residence in Nevada?

A Did I at that time? I don't know.

Q In response to the question for the three years prior to the commencement of this action the defendant was not a resident of the State of New York, did you state the

defendant denies the truth of the matter set forth in request No. 2, which matter is irrelevant since defendant established a residence in Nevada in or about June, 1967?

A I don't know.

Q I show you Plaintiff's Exhibit 4 in evidence and ask you whether that is the answer that you made?

A If it is here I am sure it is the answer I made.

Q Was it true at the time that it was made?

A I am not sure if it is true.

Q You knew that you were under oath when you made that statement?

A I answered it to the best of my ability.

Q Under oath?

A Under oath, right.

Q And as to the matters that you couldn't state of your own knowledge, you set that forth in Plaintiff's Exhibit 4, is that correct?

A I don't understand the question.

Q Well, as to the matters that you didn't have any positive knowledge, you made reservations such as, in this same Plaintiff's Exhibit 4, you stated, "As to the other items asked I cannot at this late date almost ten years after the claimed delivery or services rendered truthfully admit or deny their delivery to my former New York apartment."

Now, if you had any reservation, couldn't you have made a reservation with respect to when you took up residence in 1967?

MR. WEIDLICH: I object to the question as argumentative.

THE COURT: Yes. It is sustained.

Q Now, am I correct that in the same Plaintiff's Exhibit 4 where you had any reservation or couldn't truthfully remember, you so stated?

A In some instances I did.

Q Now, at the time you made this answer that you took up residence in Las Vegas in 1967, you had no reservation, is that correct?

A I am sure that I probably did have reservation because I am not positive.

Q You are not positive now?

A And probably wasn't positive then.

THE WITNESS: Your Honor, may I ask --

THE COURT: Do you want to make an explanation?

THE WITNESS: Yes, I do.

THE COURT: Please do so.

THE WITNESS: I lived in New York and in Las Vegas and it could be very easily checked as to when I paid state taxes, because actually wouldn't that be the legal time when

I took my legal residence in the State of Nevada?

THE COURT: I think you can rely on Mr. Weidlich to develop this in due course.

THE WITNESS: It could be easily established, I don't have to sit and guess. We could establish it accurately and wouldn't have to depend on my mind.

Q Miss McGuire, during the course of your examination before trial, I asked you for the name of the man or firm that moved you from New York to Las Vegas. Did you obtain the name of the person that moved you?

A Since then I have found something that I feel pertains to it and I brought it.

Q Did you find out the name of the firm that moved you from New York to Las Vegas?

A I think it is United Van Lines.

Q Do you have their invoice?

A No, sir.

Q Did I ask you to bring that invoice?

A Yes, sir.

Q You didn't bring it. There is one other question, did you bring the bill of United Van Lines?

A No, sir.

MR. WEIDLICH: We have a notation of a check, Mr. Drimmer.

MR. DRIMMER: She could have paid him --

THE WITNESS: Here it is.

MR. WEIDLICH: She is trying to answer my question.

Q Do you have their invoice?

A I do not have it. I said I did not.

Q Did you go to United Van Lines in order to try to get a copy of the invoice?

A I did not.

Q This is the first time that you mentioned to me or gave us notice as to who did the moving for you?

A That is correct.

Q Now, when you signed the examination before trial, you were asked to fill in the name of the person who did the moving and you will concede that you did not fill it in?

MR. WEIDLICH: I don't recall, Mr. Drimmer.

A It wasn't.

MR. WEIDLICH: Never got the name until last night.

* * *

* * *

CROSS-EXAMINATION

BY MR. WEIDLICH:

Q Miss McGuire, I show you these handwritten sheets and ask you what they are.

A A lady by the name of Mrs. Alexander was helping me keep books for a while.

Q Where was that?

A In Las Vegas, and this is a list of things owed and things paid. Items owed and deposits put in, I believe, the First National Bank.

Q Of Las Vegas?

A Yes; of Nevada.

Q Is your recollection refreshed as to the moving, the payment of the moving expenses from your apartment in New York to Las Vegas?

A There is one item here, it says, "United Van Lines, $5,600, furniture moving"; and I assume that was the furniture.

Q Is there a notation as to a check paid there?

A Right there, next to the number is 846, October 1968.

MR. DRIMMER: You don't have the invoice?

MR. WEIDLICH: Just a moment.

MR. DRIMMER: I am sorry.

Q You have already testified you have no invoice of the United Van Lines, haven't you?

A Correct. I can't find it.

MR. DRIMMER: May I see the paper she used to refresh her recollection?

MR. WEIDLICH: Sure.

Q Miss McGuire, in the summer, starting with July

1, 1967, on what banks were payments made for your maid service and other expenses of your home in Las Vegas?

MR. DRIMMER: I object to that as being immaterial.

THE COURT: What point are you trying to develop?

MR. WEIDLICH: She maintained her bank account--this is at the time of acquiring title, her payments were made from her New York bank account which she had maintained before. She had not as far as residence goes established a bank account out in Las Vegas in that time, in the summer.

THE COURT: I suppose what the ultimate question here is where the defendant was actually living at the time?

MR. WEIDLICH: No. The question is really whether she was absent from the state under the tolling.

THE COURT: Did she maintain a residence in New York City?

MR. WEIDLICH: Yes.

THE COURT: An apartment on which rent was paid?

MR. WEIDLICH. That is right. And I was going --

THE COURT: You are going to develop that?

MR. WEIDLICH: Surely.

MR. DRIMMER: Assuming she had an apartment on which rent was paid, pursuant to the terms of a lease, and

even if she did pay the rent that doesn't mean she lived there.

THE COURT: That might very well be. It is simply some evidence and you can develop evidence to the contrary.

Does this go to the defense of the statute of limitations?

MR. WEIDLICH: This is based on the tolling of the statute on the ground she was out of the State of New York for four continuous months in each year. That is the New York statute.

THE COURT: When was the last delivery made according to the claims of the plaintiff?

MR. DRIMMER: 1964.

THE COURT: The suit was started when?

MR. DRIMMER: 1969. It wouldn't have made any difference.

MR. WEIDLICH: Just one item in 1964.

THE COURT: What difference does it make how many items there were or how how few?

MR. WEIDLICH: This was not an account where there were services from May of 1963. The only thing is a chair shipped out December of 1963 and then a foyer bench recovered in May of 1964. There is no continuous service rendered by the plaintiff here so that these transactions

which we say are separate and there was a modification, she was originally retained for one purpose and then did these other transactions and the statute should run from the time the statements were rendered and services were completed.

THE COURT: Did the defendant ever make any payment on account?

MR. WEIDLICH: Yes. $5,000 originally.

BY MR.. WEIDLICH:

Q Miss McGuire, your apartment in New York at this time was where?

A 525 Park.

MR. DRIMMER: May I ask you to identify the time?

Q When you moved there, when was that?

MR. DRIMMER: Where?

A To 525 Park. I brought the leases.

Q Did you obtain a sublease from Mr. Milton Berle?

A Yes, I did.

Q I show you this lease and ask you if that is the sublease which you obtained when you first went into the apartment?

A Yes.

Q What is the date, the commencement date?

A 18th of June, 1959.

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Q At that time did you purchase furniture from Mr. Berle?

A Yes, I did.

MR. DRIMMER: I obejct to that as being immaterial and not proper cross-examination.

MR. WEIDLICH: Well, your Honor, there is a sum here involved and there was a preceding interior decorator paid about $20,000. Mr. Berle is paid $4,000 and it is a five-room apartment and this suit is for about $18,000. We think that the services here may have been overlapping between the former --

THE COURT: What has that got to do with whether or not the plaintiff performed certain services and delivered certain materials? It doesn't make any difference, does it, how much was in the apartment before?

I thought you were getting at simply what the period of residence was and when the defendant moved. I don't see what this has to do with it.

MR. WEIDLICH: There is no provision for payment of furniture in the lease.

THE COURT: What difference does it make whether she paid anybody else for furniture or food or anything else?

MR. WEIDLICH: It is just a question whether

the apartment can stand $24,000 plus $18,000 in furniture.

THE COURT: I will sustain the objection to your going ahead with this now. You may make it relevant at some later time in the case.

MR. WEIDLICH: I offer the lease in evidence.

MR. DRIMMER: I have no objection.

(Defendant's Exhibit A received in evidence.)

MR. DRIMMER: I just note that the lease expired in 1960 -- may I withdraw my statement? I have no objection.

While I have no objection to your Honor seeing it or it going into evidence, I think it will be unnecessarily cluttering the record.

THE COURT: Obviously the defendant stayed in the apartment after 1960 and apparently until some time in 1967 or 1968. What difference does it make what happened in the meantime?

BY MR. WEIDLICH:

Q I show you this paper and ask you to identify it, Miss McGuire.

A It is a lease of apartment 8-C, the same apartment, that is signed in April, 1965.

Q For a period of how many years?

A For a term of one year and an option for one year

and an option to be exercised by March 1st, 1966 for an additional year.

Q Who was the lessor?

A It was the 525 Park Avenue Corporation.

MR. WEIDLICH: I offer this in evidence.

MR. DRIMMER: May I see it?

I object to it on the ground that no proper foundation has been laid for the introduction of this.

THE COURT: The foundation is solid enough. The only question is how material this is.

Do you want to put all the papers in the record, Mr.Weidlich?

MR. WEIDLICH: No, we don't need them.

THE COURT: I would think it is enough that the defendant was there and rented an apartment under a lease from somebody.

MR. WEIDLICH: Right.

Q Do you recall whether or not you renewed the option, the option to renew the lease of that particular apartment in 1966?

MR. DRIMMER I object to this question.

THE COURT: Overruled.

A I did renew the lease.

Q That was for a period of how long?

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A I believe a year. Actually Mr. Osnick, who was the owner of 525 corporation, notified me and if I didn't notify him back within a certain period of time, then the apartment automatically went on for one year; if I didn't notify him I was not going to remain there.

MR. DRIMMER: Just a moment. Hold on. I move to strike that question from the record. It is a statement of her belief and what she actually was setting forth was a statement of what she believes the arrangement was. I think that the writing is the best evidence of that.

THE COURT: I will overrule the objection.

Will you get to the point where we are going to find out how long it was?

MR. WEIDLICH: That is it.

THE COURT: The defendant paid rent?

MR. WEIDLICH: That is right.

THE COURT: How long did you pay rent in that apartment?

MR. DRIMMER: We have the checks. That would be the best evidence, wouldn't they?

MR. DRIMMER: No, I think not. She may testify as to payment.

THE COURT: This witness is competent to testify but if you want to ask whether there are checks you may do

so when it comes your turn again.

A I believe that my lease was up in October.

Q In what year is this?

A 1968.

Q Do you remember paying rent up to that time?

A Yes.

MR. DRIMMER: May I ask counsel not to lead the witness at this point? I think his question is leading.

MR. WEIDLICH: It is cross-examination. I thought we could expedite it.

Q Now, do you know who attended to moving your furniture from your apartment to Las Vegas?

A I believe it was United Van Lines.

Q No, who of your employees or you yourself?

A A secretary I had and Enice Jobe who is here today.

Q Which you said was in October of 1968?

A Yes.

Q In the years 1966 and 1967, have you produced for those years your contracts of engagement for those years?

A Yes, I have, as many as I could find.

Q Is this the batch for 1966?

A Yes, sir.

MR. WEIDLICH: I offer those in evidence.

THE COURT: What is the point of this offer, Mr.

Weidlich?

MR. WEIDLICH: To show she was not absent from New York at any time in any year for a continuous period of four months under the statute. Mr. Drimmer asked for these records on the deposition and we have produced them in accordance with that.

THE COURT: Do these records show that there were such engagements in New York City or New York State?

MR. WEIDLICH: In New York and outside New York.

MR. DRIMMER: I object to the production of that into evidence. I don't think that any proper foundation has been laid.

THE COURT: Why don't you develop it first with the witness, whether or not there is any point in offering all of these papers? The witness might wish to refresh herself from them, and perhaps she may have already done so and can answer the questions which will sustain the point you are trying to make.

BY MR. WEIDLICH:

Q Do you recall being asked, Miss McGuire, by Mr. Drimmer on your deposition to produce any contracts or any records of AGVA, the standard form of artist engagement contracts, and those of AFTRA relating to television?

A Yes, I do.

Q Have you not produced those for the years that you have in 1966, 1967 and 1968?

A Yes.

Q Now, Miss McGuire, you have gone through those, have you not?

A Yes, I have.

Q Were you at any time in those years absent from New York for a continuous period of four months?

A I was not.

* * *

Q Would you refresh your recollection from these contracts as to your engagements in 1967 and state to the Court the length of some of those engagements.

THE COURT: Is this with particular reference

* * *

THE COURT: Now, we are not going to waste any more time on this.

Counsel, you look at these records and take all the time that you reasonably need, and if you want to have a brief recess in the trial we will do that. Do you want to look at those records produced for those three years?

MR. DRIMMER: These records are not in evidence. They have not been offered in evidence as I recall.

MR. WEIDLICH: No.

THE COURT: But the witness has been asked to look at them to refresh her recollection.

MR. DRIMMER: Is that a paper that you are going to show her to refresh her recollection?

THE COURT: I suggest that you defer your examination of this until Mr. Weidlich has finished developing from the witness that which seems to be relevant to the issues in this case and then you may look at them and we will then go to the question of how much time you need in order to fully explore the possibilities presented by

these documents.

MR. WEIDLICH: It won't be long.

MR. DRIMMER: I will defer to your Honor's suggestion.

BY MR. WEIDLICH:

Q Answer the question as to the --

A Restate it.

Q -- length of your engagements.

A February 2 to 20, the Dean Martin Show. June 8th, one day, Chicago.

THE COURT: Where did you do the Dean Martin Show?

THE WITNESS: In Los Angeles.

MR. DRIMMER: I object to all of this about engagements in Los Angeles as having no bearing upon her presence in New York.

THE COURT: Can't you focus on what this has to do with residence and availability in New York?

MR. WEIDLICH: It has to do with four months absence under the statute from the State.

THE COURT: But absence from New York.

MR. WEIDLICH: Yes.

THE COURT: If she was absent in the entire year at places other than New York what have you established?

MR. WEIDLICH: I think there is established by testimony that after these shows that were performed by Miss McGuire she then returned home and therefore she was able to make a statement granted I was out of New York, your Honor, but I am testifying.

THE COURT: Why don't we ask her about that.

MR. WEIDLICH: That is what we are trying to develop, she did shows and returned to her New York residence thereafter.

So long as she didn't have a summer engagement somewhere all summer long, and I am trying to show the length.

BY MR. WEIDLICH:

Q In this year 1967 after these engagements out of town,where did you go?

A I came back to my apartment at 525 Park.

MR. DRIMMER: We again -- this is what we get when we go into general allegations. 1966, I don't know whether this last answer refers to 1966 or 1967.

THE COURT: Is that a chronological list?

MR. WEIDLICH: Yes.

MR. DRIMMER: May I see it?

Who prepared this list?

MR. WEIDLICH: My office prepared the list.

MR. DRIMMER: Will you mark this for identification so we will know what we are talking about?

MR. WEIDLICH: I am not offering it in evidence. This is to refresh her recollection.

MR. DRIMMER: For identification.

MR. WEIDLICH: We can go through all of these.

MR. DRIMMER: It is only so we will know what we are talking about, Mr.Weidlich.

THE COURT: If the witness is using the list or piece of paper from which to refresh herself, then I think it is reasonable that at least the paper or whatever it is be marked for identification.

(Defendant's Exhibit B marked for identification.)

THE COURT: In the hope that would be the full extent of any interruption of your examination at the present time.

BY MR. WEIDLICH:

Q Would you state again for the Court where your engagements were in 1967.

MR. DRIMMER: I object to the question unless it is established -- I think counsel stated that he prepared this Defendant's Exhibit B.

THE COURT: It doesn't make any difference who prepared what. The only question is what the witness

remembers as result of looking at the document.

MR. WEIDLICH: Here are the documents and here is a list of what the documents are. Do you understan that?

A January 5, two weeks in Puerto Rico.

February 22nd to 26th--

THE COURT: What did you do after the two weeks in Puerto Rico?

THE WITNESS: I came back to New York.

THE COURT: That is the point to develop, Mr. Weidlich. Please do that instead of going over a lot of everything else except in New York.

A I was in New York until February 22.

THE COURT: What year?

THE WITNESS: 1967.

MR. DRIMMER: May I, in the interest of moving on, anything that develops prior to July 1st,1967 we concede she was in New York until Julylst, 1967. I think this serves no purpose to go over it before that date.

THE COURT: Does that help you, Mr.Weidlich?

MR. WEIDLICH: No, it doesn't, because we have dates in October and November and January 12 --

THE COURT: Go right to July and start from there.

A July 6th, nine days in Calgary, Alberta, and

back to New York.

MR. DRIMMER: When was that?

THE WITNESS: July 6th.

MR. DRIMMER: 1967?

THE WITNESS: Yes. Nine days.

A (Continuing) July 21, one day, Cincinnati, Ohio, and back to New York the next day.

July 24th, five days, Cincinnati, Ohio, back to New York.

October 9, five days, Columbus, Ohio, back to New York.

October 23, six days, Omaha, Nebraska.

November 10, ten days, Three Rivers, and back to New York.

November 26, six days, Detroit, Michigan, and back to New York.

Q Then after January --

A The other would be at the Ed Sullivan Show, New York, New York, April 23.

Now, in 1968 --

MR. WEIDLICH: Still in 1967. I meant to start in September.

THE WITNESS: I see. Las Vegas and then October 22 in New York, Ed Sullivan Show, and December 5, Los

Angeles, the Jerry Lewis Show. I came back home which was New York.

Q So you were never absent in that year according to your records as you have refreshed your recollection for more than four months or up to four months?

A No.

THE COURT: For as much as four months.

MR. WEIDLICH: As much as, yes, sir.

Q Is that true of the year 1968 as far as you can recall?

A Yes, sir.

Q State how long you were away, if you remember in 1968.

A 1968, January 8, one day Chicago, concert date with Johnny Carson, one day and back to New York.

April 21, 1968, one day at the Fontainebleau Hotel, Miami, and back to New York.

March 10, 1968, one performance at the Ed Sullivan Show at Caesar's Palace, Las Vegas, Nevada.

June 1st, 1968, one day, Johnny Carons, Nashville, Tennessee.

May 10th through May 19th, 1968, eight shows as follows: Two shows May 11th and 18th and one show on May 10th, 12th and 17th and 19th, a concert date with Johnny

Carson. That consisted of two days at one time and four days the next time, and then back to New York.

Q In that year did you have any engagements in Las Vegas?

A 1968?

Q In 1968, yes.

A Yes. I was at Caesar's Palace, Las Vegas, March 10, this was the Ed Sullivan Special from Caesar's Palace.

Q Later in that year you actually moved to -- or did you move --

MR. DRIMMER: Again --

MR. WEIDLICH: May I finish the question?

MR. DRIMMER: Please do not lead the witness.

Q Whether or not you stayed in your new home at any time in 1968 in Las Vegas.

A Yes, I did, when I was there.

Q After October, where did you stay if you had an engagement outside --

MR. DRIMMER: October of which year?

MR. WEIDLICH: Talking about 1968.

A I stayed in Las Vegas after I moved from New York.

* * *

* * *

THE COURT: It occurs to me, Mr.Weidlich, that you are going to have full opportunity before the proofs are closed in this case to develop any defenses that you may wish. Wouldn't it shorten things and make it somewhat easier for Miss McGuire in giving her evidence if you first heard from Miss Broedy as to what the claims were?

MR. WEIDLICH: I quite agree.

THE COURT: Suppose we do that, not that you agree, but simply because it is the Court's suggestion.

* * *

* * *

BY MR. DRIMMER:

Q Miss McGuire, am I correct in stating that on each occasion when you had an engagement during the years 1966 and 1967 and 1968, every time you had an engagement as soon as you concluded you went back to your New York apartment?

A Correct.

Q And the only time that you used your Las Vegas residence is when you lived in Las Vegas?

A Not necessarily. That would not be the fact or true.

Q That would not be the fact?

A No, because if I were working --

Q Just a minute --

A Just a moment, I have to explain.

Q Go ahead.

A If I were working in Las Vegas, which I did, you can check the contracts, and if I finished on Friday or Saturday and if I didn't have something earthshaking to get back to New York for, I may go to Las Vegas for a few days and check work that I was having done in my home there. I was having some construction work done so I could not answer that.

Q You opened up an account in Las Vegas in 1967?

A I would say maybe that year I had a bank account there.

Q Isn't it a fact that on September 25, 1967 you opened up an account at the First National Bank of Nevada?

A If you are referring to some things I brought in here where Mrs. Lynch handled deposits in the bank, that means I had an account in the bank.

Q Did you open an account in the First National Bank of Nevada on September 25, 1967?

A Is this referring to --

Q Answer yes or no.

10x

A I don't know.

Q Would you ask your attorney for the records?

MR. DRIMMER: Will you produce the records?

MR. WEIDLICH: It is irrelevant to the question of her residence.

MR. DRIMMER: You developed that she had a bank connection in New York and --

THE WITNESS: Hold it.

MR. DRIMMER: I want to rebut that right now, and may I quote from your statement in your affidavit, Mr. Weidlich, in which you state --

MR. WEIDLICH: I am certainly going to object to this, your Honor.

THE COURT: The witness has said she doesn't know, is that right?

THE WITNESS: I don't.

THE COURT: What is the next question?

Q Did you give whatever information that you had with respect to bank accounts to Mr. Weidlich?

A I gave some.

MR. DRIMMER: At this time I ask counsel, Mr. Weidlich, to produce whatever evidence he has with respect to the establishment of a bank account at the First National Bank of Nevada on September 25, 1967.

MR. WEIDLICH: I have no evidence as to that. I have the checks here, one of which I gave to you in the summer showing Miss McGuire had an account in the Irving Trust Company in New York.

Q Miss McGuire, I read to you a statement that is contained in the affidavit of Clifton Weidlich, sworn to on October 29, 1971, which is on file in this court which states as follows:

"During the summer of 1967 defendant who was performing in one of the hotels in Las Vegas offically removed her residence from New York to Nevada. Copy of check drawn by Phyllis McGuire dated July 1st, 1967 to the order of Bessie McNeil for maid services rendered in June, 1967 at the defendant's residence, 100 Rancho Circle, Las Vegas, Nevada, 89107, is attached hereto as Exhibit A.

"Also annexed as Exhibit B is a statement of the First National Bank of Nevada, which was opened by defendant on September 25, 1967. If need be, checks drawn by defendant in payment of utilities, swimming pool services and water bills pertaining to her Las Vegas home will be produced."

Now, are those statements correct?

MR. WEIDLICH: I object to the

question to the witness concerning my statements.

THE COURT: I think the question is proper.

MR. WEIDLICH: Objection withdrawn.

A May I explain these?

Q Just answer whether those statements that I just read to you that were sworn to by your attorney, whether they are correct.

A If my attorney swore to them they are correct.

Q Did you give him the information on which --

MR. WEIDLICH: I object to this. She answered the question, your Honor. It seems that is repetitious.

THE COURT: Defendant is conceding that those statements are correct.

Is that what you are trying to develop?

MR. DRIMMER: Yes.

THE COURT: Then you have it.

MR. DRIMMER: I would like to find out where are those checks that eatablish she opened a bank account on September 25, 1967. I am past that.

MR. WEIDLICH: Are you addressing your question to me?

THE COURT: No. Counsel is asking the witness if she knows where the checks are.

THE WITNESS: Not at the moment but probably I can

produce those checks.

BY MR. DRIMMER:

Q Didn't you produce those checks to Mr. Weidlich?

THE WITNESS: Did I?

MR. WEIDLICH: I don't know whether you did or your secretary notified me. This is in the question about the opening of the account.

THE WITNESS: May I explain at one time --

MR. DRIMMER: There is no question before you. It is up to your attorney.

THE WITNESS: I don't think I will ever at the rate it is going.

THE COURT: Miss McGuire, there will be plenty of opportunity to go into all the matters.

MR. DRIMMER: I think I made my point and I will get off it now.

Q Do you have the checks that were made by you to your landlord for the apartment in New York after July 1st, 1967?

A To 525 Park?

Q Yes.

A If I can produce the checks --

Q Do you have them?

A I don't know. I think I do.

Q You looked for the lease, did you not?

A Yes. I didn't; my secretary did.

Q You produced the lease?

A Yes.

Q But you didn't produce the checks?

A No.

MR. WEIDLICH: You asked for the lease, Mr. Drimmer.

Q You also don't have a copy of the invoice of United Van Lines?

A Not at this moment I don't.

Q Was Miss Alexander retained by you to make a record of your activities from October 1st to November 1st?

MR. WEIDLICH: What year?

MR. DRIMMER: I don't know -- I am sorry.

Q 1968.

A Mr. Drimmer, there is just one thing that looking through the files I found. I am not sure if this is when Mrs.Alexander started, if this is the first thing she did or the second or third or fourth. She worked for me for about six or seven months.

Q Is this the only paper that you have prepared by Miss Alexander?

A I am sure it is not. That is the only one I found.

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Q Did you tear off any other papers that covered the period both before and after October, 1968?

MR. WEIDLICH: Objection. This isn't even in evidence here that you are talking about.

MR. DRIMMER: Will you mark this as a plaintiff's exhibit for identification.

(Plaintiff's Exhibit 5 marked for identification.)

MR. DRIMMER: Produced by the defendant is marked for identification, I don't know whether it is a plaintiff's exhibit for identification or a defendant's exhibit for identification.

MR. WEIDLICH: We haven't offered it.

MR. DRIMMER: We are not offering it.

THE COURT: You are asking that it be marked.

MR. DRIMMER: Yes.

Q I show you Plaintiff's Exhibit 5 for identification and ask you to tell us when you first found this?

A Last week.

Q Could you tell me the form in which it was found?

A The form that it is in.

Q Were there any papers on there that referred to any checks issued prior to October 1st, 1968?

A No, sir.

Q Were there any checks making any reference to checks written after October 27, 1968?

A Let me look at it.

This is the form I found it in. I took nothing off of the front or the back or in between.

Q Except as to what is contained on that Plaintiff's Exhibit 5 for identification, you don't have any independent recollection as to the transactions contained on that exhibit?

A I don't have any recollection as to what?

Q As to the entries made there.

A Yes, I would say when you see a figure here of $1,655 and $1,070 and $5,626 and $6,010, you would have some recollection of that amount of money.

Q All right.

THE COURT: We all got started on this because of the United Van Lines item. Isn't that all we are concerned with here?

MR. DRIMMER: That is correct.

THE COURT: What is it you are trying to develop?

Q Did you also look for the invoice of United Van Lines?

A I answered that twice today already.

THE COURT: Yes. Sustained. We are not going into that again.

Q In 1967 was your swimming pool filled?

A Yes. Which pool? Where?

Q In Las Vegas, the one attached to 100 Rancho Circle in Las Vegas.

A Was it filled?

Q Yes.

A With what, water?

Q Water.

A I believe it was.

Q Did you use the swimming pool?

MR. WEIDLICH: I object to that.

Q In 1967.

THE COURT: The use of the swimming pool shouldn't establish absence from New York for a four-months period.

MR. DRIMMER: It would indicate just the intent to spend --

THE WITNESS: It was built in Las Vegas and it is filled the year round.

THE COURT: Many people have more than one home or more than one place they stay. But I suppose counsel is developing something.

* * *

* * *

Q When you learned that the telephone had been disconnected, what did you do?

A Went around and asked the doorman if she was in and he wouldn't tell me if she was in or she just left.

Q Did there come a time when you had a conversation with respect to -- did you then go back again?

A Yes, I went back several times.

Q When was the last time that you were there?

A It was 1967.

Q What did you find out when you were there?

A 1968. I was told she had moved.

Q Wha part of 1968 was that? Was it the early part or the latter part?

A The latter part. He didn't tell me when, he just said she moved and that was it, period. She no longer lived there.

Q Did you try to locate her?

A I didn't know just where to locate her. I sent mail and it came back.

Q Did you send mail or have somebody write for you?

A I sent a letter and I believe my attorney sent one and it came back.

Q Did you try to find out where Miss McGuire moved to?

A I tried by inquiring from the doorman.

Q Were you able to locate her?

A No.

Q How did you locate her?

A Well, after the case was turned over to my attorney, he proceeded to locate Miss McGuire.

Q By your attorney you refer to whom?

A Mr. Drimmer.

* * *

* * *

Q Did you ever try to hand-deliver any mail to Miss McGuire at the apartment?

A No.

Q Did you speak to Mr. Ausnit, the president at 525 Park Avenue Corporation --

A No.

Q -- concerning Miss McGuire's whereabouts?

A No.

* * *

Q So, Miss Broedy, you did not consult Variety, the firm known as Celebrity, as to Miss McGuire's professional engagements and whereabouts?

A No. Let me say this, Mr. Weidlich: My relationship with Miss McGuire all through this was very friendly. This was not a deal that was cut and dried. If Miss McGuire wanted some information she thought nothing of

calling me up at one o'clock in the morning to help her do a dinner setting, so I didn't see any reason -- I didn't think that I would have to go to any of these places to inquire as to where Miss McGuire's whereabouts would be.

Q So you did not make any inquiry?

A I went to the building to inquire could I go up, and they would tell me either she wasn't in and then they told me that she wasn't there.

Q And when do you think they told you that? When do you say?

A That I don't remember.

Q You do not know whether it was '66, '67 or '68?

A Well, it certainly wasn't '66.

Q It was not?

A No.

Q And was it in '67?

A I don't recall.

* * *

* * *

E N I C E J O B E, called as a witness by defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. WEIDLICH:

Q Miss Jobe, what is your occupation?

A Well, I worked for Miss McGuire as housekeeper and maid.

Q And when was that?

A Well, I worked for her from 1954 until 1971.

Q You were with Miss McGuire here in New York when she lived on East 57th Street, were you?

A Yes.

Q And then you went with her to 525 Park Avenue?

A Yes, I did.

Q First of all, were you there at 525 Park Avenue when the furniture was moved to Las Vegas?

A Yes, I was.

Q And what did you do with respect to the moving?

A Well, I saw that everything was packed and on the van before it left.

Q Did you supervise it for Miss McGuire?

A Yes, I did.

Q And when was that, do you remember?

A That was -- I believe that was the end of September in 1968.

Q And when the moving was done where did you go?

A After the van left, I think it was the next day, I flew out to Las Vegas and I was there when the van arrived with the furniture.

Q Did you have anything to do with the unloading actually?

A Just to see that -- to direct the men where to put it.

Q Do you remember the name of the moving company, the line?

A At the moment I don't.

Q But you did see the van here in New York?

A Yes; and when it --

Q Loaded up and when it unloaded?

A Yes.

Q You have been here and heard the testimony, have you not?

A Yes.

Q In the year 1967, let us say, when Miss McGuire left for engagements, would she return to New York?

MR. DRIMMER: Just a moment. I object to that question. I think I permitted him to lead up to a point, but when there is crucial time I think at this point he should not lead the witness.

THE COURT: Yes, I will sustain that.

Q Tell us, if you will, Miss Jobe, Miss McGuire's activities in 1967?

A Well, she usually had engagements that she would go to her engagements and then return to her apartment in New York.

Q And you were her sole housekeeper for the year, were you not?

A Yes.

* * *

* * *

Q Did you hear Miss Broedy say that she had a key to the apartment?

A Oh, yes, I knew about that.

Q You knew that?

A Yes.

Q And do you know when the key was given up?

A No, I don't.

Q But for some time she had free access to the apartment?

A Yes.

Q Did you live inthe apartment?

A No; I went home at night.

Q Oh, yes. How was mail delivered at 525 Park Avenue? By the way, that was apartment 8-C, on the 8th floor, wasn't it?

A Correct.

Q And how was it delivered, to the door or downstairs?

A They delivered it downstairs and then the doorman would put it at the door.

Q At the door.

A Yes.

Q And what months prior to October 1, 1968 in that year were you in the apartment?

A Most of the time.

Q Well, you say "most of the time." Would you be away for a whole month at a time?

A Sometimes.

Q And at that time would Miss McGuire be there or not?

A Sometimes she was there and sometimes she wasn't.

Q And how did the building handle the mail in your absence and in Miss McGuire's absence?

A The secretary -- Miss McGuire's secretary would come from the office and take the mail.

Q So the apartment was covered, was it?

A Yes.

Q By somebody in all of those months in 1968?

A Yes.

MR. WEIDLICH: That is all.

MR. DRIMMER: I object to that last question and I move to strike out the answer -- "So the apartment was covered" during the entire year 1968 -- I think that that calls for a conclusion. This witness was not present at the time and certainly --

THE COURT: Yes, I will strike that out. It is a

conclusion.

BY MR. WEIDLICH:

Q Miss Jobe, tell us whether or not in that year, prior to October 1, 1968, was someone in the apartment either in your absence or in the absence of Miss McGuire.

MR. DRIMMER: I object to that question. In her absence she wouldn't know who was there.

THE COURT: Sustained.

Q Tell us whether or not you were in the apartment when the secretary was there on occasion.

A On occasions, yes.

Q And what time would you come in in the morning?

A I usually --

MR. DRIMMER: I object to that as being immaterial to the issues involved here.

THE COURT: Overruled.

A I usually get there 10 o'clock in the morning.

Q And whom would you see, if anyone, when you came in?

A Miss McGuire if she was home, and if she wasn't home, it would be me.

Q Well, was there anybody else?

A If the secretary came in. You see, nobody lived there except Miss McGuire and her -- if she wasn't

home then there was nobody except myself and the secrerary that would come in.

Q What were the secretary's working hours, if you know?

A I think she got in about 10 o'clock.

Q And was that every day?

MR. DRIMMER: Well, on the days that she was there.

A The days that I saw her.

* * *

* * *

CROSS-EXAMINATION CONTINUED

BY MR. DRIMMER:

Q Miss Jobe, in 1971 you appeared at the office of Mr.Weidlich, did you not?

A Yes.

Q And you gave him the facts as you knew them --

A Yes.

Q -- is that right?

A Yes.

Q Now may I read to you from a statement that was -- an affidavit that was sworn to by Mr.Weidlich on October 29, 1971 wherein he states:

"The foregoing recital of facts was obtained from defendant and her housekeeper-cook, Enid Jobe, at Las Vegas, Nevada, in the summer of 1970 when an associate lawyer, at my request, called upon Miss McGuire at her home in Las Vegas. Later this year Miss Jobe appeared

at our office in New York and corroborated the facts as stated by defendant. Miss Jobe was employed by Miss McGuire in New York prior to 1967 and went with her to Nevada in that year."

Now is that a correct statement?

A Yes, I went with her then. She had an engagement there.

Q I see. And except for an engagement, you did not go there, is that right?

A No.

Q You came right back to New York?

A Came back to New York.

Q Now may I read to you from another portion of this same affidavit which was based upon the facts that you gave to Mr. Weidlich and the facts that Miss McGuire gave to Mr. Weidlich in which it is stated:

"In June, 1967" --

and I am quoting from item No. 6 on page 2 of the affidavit that was made by Mr.Weidlich on October 29, 1971, in which it is stated:

"In June, 1967 defendant obtained title to a house and grounds in Las Vegas, Nevada"?

A That is correct.

Q Then it says:

"During the summer of 1967 defendant, who was performing at one of the hotels in Laa Vegas, effected the removal of her residence from New York to Nevada."

Is that correct?

A No, that is not correct.

Q Did you make such a statement to Mr.Weidlich?

A I don't remember saying that at all.

Q So if it is in there that statement made by Mr. Weidlich is false, is that correct?

MR. WEIDLICH: Objection.

THE COURT: Sustained.

Q Now I point to a paragraph, Plaintiff's Exhibit 4 in evidence, which was signed by Phyllis McGuire, in which it is stated:

"As to the other items scheduled I cannot at this late date, almost ten years after claimed delivery or service rendered, truthfully admit or deny their delivery to my former New York apartment from which I removed in 1967." --

and I ask you whether that might refresh your recollection as to the date when Miss McGuire removed from her New York apartment?

A She moved from her New York apartment in 1968--

MR. DRIMMER: I move to strike it out, your Honor.

A (Continuing) -- because I was there.

Q Does this refresh your recollection as to the date?

A No.

Q Before coming here to testify you discussed this matter with Miss McGuire, did you not?

THE COURT: Is that Exhibit 4 in evidence?

MR. DRIMMER: In evidence.

THE COURT: Is that in evidence?

MR. DRIMMER: It is in evidence-- that part is underlined (indicating).

THE COURT: This exhibit is not signed by Miss McGuire, but I take it is understood that she signed the original?

MR. DRIMMER: It is conceded she signed the original.

MR. WEIDLICH: Yes.

MR. DRIMMER: Would your Honor like to have the affidavits that I quoted from?

THE COURT: Well, the affidavit from which you quoted is part of Exhibit 4, is it not?

MR. DRIMMER: No. That is an affidavit -- the

* * *

MR. DRIMMER: It starts with paragraph number 6.

THE COURT: I take it that Bessie McNeil is the maid that Miss McGuire had in Las Vegas?

MR. WEIDLICH: Oh, yes.

BY MR. DRIMMER:

Q Now you were there at the time that the first bathroom was installed, were you not?

A Yes.

Q Could you tell me whether there were any base cabinets installed along the window wall?

A Yes.

Q Was there a marble top for cabinets installed?

A Yes.

Q Was there a white gold basin put in?

A Not that I know of.

Q You remember that or you don't remember it?

A I don't remember it.

Q You don't remember. Were there wall cabinets put in above the base cabinets?

A Yes, behind the mirrors.

* * *

DIRECT EXAMINATION

BY MR. WEIDLICH:

Q Miss McGuire, I show you this affidavit and ask you if you signed and swore to that affidavit (handing).

(Witness examines.)

Q (Continuing) This is a copy of it.

A Yes, sir.

MR. WEIDLICH: May I have it marked for identification, please.

(Marked Defendant's Exhibit J for identification.)

Q In that affidavit --

MR. DRIMMER: May I know the date of it?

Q (Continuing) -- submitted in support of your motion for summary judgment --

MR. WEIDLICH: What did you want?

MR. DRIMMER: I would like to know the date of the affidavit that is marked for identification.

MR. WEIDLICH: It is not conformed. This is the blank day of April, 1972. The original is on file.

Q In that affidavit you said, Miss McGuire, --

MR. DRIMMER: I object to his reading from anything that is not in evidence.

THE COURT: Well, it is in the files of this case,

isn't it?

MR. WEIDLICH: Yes.

MR. WILLIAM WEIDLICH: Yes, it is.

Q You said in paragraph 9:

"In the summer of 1967 when I was under engagement to sing at Las Vegas, I obtained title to real property in Las Vegas. At the same time I opened a checking account with the First National Bank of Nevada. However, I did not close my New York apartment until September 1968.

"10. Accordingly I am informed and believe that I was subject to personal service of process within the State of New York until September, 1968. The assertion of plaintiff that I was a non-resident of New York for three years prior to August 26th, 1969 is untrue."

Did you make those statements?

MR. DRIMMER: I object to that question.

A Yes, I did --

MR. DRIMMER: Just a moment. Whether she made the statement, this witness is here at the present time and can testify --

MR. WEIDLICH: Well, I am trying to ask her.

MR. DRIMMER: This would be giving a very leading

question to this particular witness.

MR. WEIDLICH: You have read from her prior affidavits.

THE COURT: I take it that Mr.Weidlich is directing the witness' attention to certain facts and situations so that he can ask her other questions --

Is that right, Mr.Weidlich?

MR. WEIDLICH: Yes.

THE COURT: All right, will you do that.

BY MR. WEIDLICH:

Q Is it true, Miss McGuire, that you were not a non-resident of New York for three years prior to August 26, 1969?

A I was a resident in New York.

Q Yes.

A Yes, that is true.

Q It is true that you were a resident.

A Right.

Q Now when did you close your New York apartment located at 525 Park Avenue?

MR. DRIMMER: I object to that. That question has been asked of this witness and answered by her.

MR. WEIDLICH: But you have just submitted what appears to be contrary to that.

MR. DRIMMER: Well, was I correct in my submission? Did I quote from your affidavit? Did I quote from --

THE COURT: These facts speak for themselves.

As I understand it, the witness has already said that close to October 1, 1968 she moved furniture out of her New York apartment to Las Vegas --

MR. WEIDLICH: Yes.

THE COURT: -- is that right?

MR. WEIDLICH: Correct.

THE COURT: What is the next question?

BY MR. WEIDLICH:

Q I show you this paper designated "Amended Response To Request For Admission" (handing).

Would you look at this copy and tell me if you swore to that paper.

A (After examining) Yes.

Q Do you remember when, Miss McGuire? Here is a conformed copy (handing).

(The witness examines.)

Q (Continuing) Does that refresh your recollection of this?

A As to when I signed this?

Q As to when you signed and swore to it, yes.

A In '73, August of '73.

Q No. What is the date on here that you swore?

A "Sworn to before me this 11th day of October, 1973" -- October.

MR. WEIDLICH: May this amended response be marked for identification?

(Defendant's Exhibit K marked for identification.)

Q Miss McGuire, request No. 2 in the requests for admission made upon you states:

"For three years prior to the commencement of this action defendant was not a resident of the State of New York."

The response to request No. 2:

"Defendant denies the truth of the matter set forth in request No. 2 since defendant maintained her residence in New York City until October 1, 1968."

Is that response correct?

A Yes, it is.

* * *

* * *

Q Did you hear Miss Broedy testify that the work as done by Mr. Sillis in your apartment at Park Avenue was finished for the most part on July 31, 1960?

A I believe so.

Q Now after that date in 1960 what was your relation, if any, with Miss Broedy, the plaintiff?

A My relationship continued with her as -- just the same as when she was with Sills, and we continued our relationship.

Q What conversation did you have? What was the substance of your conversations after that?

A Well, I was going to London to appear at the Talk of the Town and to do a command performance, and we had discussed before I left that she would do -- redo my bathroom.

Q And in what year was that?

A In 1961.

Q And how long were you in London, do you remember?

A Probably ten weeks.

Q It is stated in the papers somewhere that you were there until November 28th.

MR. DRIMMER: I object to what the paper states. This is his own witness. He cannot impeach the credibility of his own witness.

MR. WEIDLICH: I have not finished the question.

Q Does that refresh your recollection, Miss McGuire, as to the time that you were in London?

A I believe I gave you the correct date because I checked my passport and it is stamped on the passport when I came back into the country, and if that is what you are referring to, if that is the date that you are referring to, then it is accurate.

Q When, if ever, did you send a cablegram to Miss Broedy about the work she was to do?

A It had to be from the Savoy Hotel in London because that is where I was staying.

Q Did you make a payment to her at the same time?

A From London?

Q From London or from here or wherever.

A I made a payment to her before I left for London.

Q What was to be done with respect to the bathroom,

as you recall it?

A It was to be mirrored and some drawers put in, and it was to be beautified really, what it boils down to, and to make it seem larger. It was a very small bathroom.

Q Was there any talk about marble fixtures or furnishings?

A No, there was not.

* * *

* * *

Q Very good. Now I am addressing you to the question of when that was raised, when that suggestion or offer

was made to you by Miss Broedy about a substitute, brand new bathroom.

A I don't remember ever our discussing that we were going to do a new bathroom. I remember that what we were going to do was to correct the one that was there and make it workable and right.

THE COURT: Does this mean that you and Miss Broedy talked about this?

THE WITNESS: Yes, we did.

Q Was any figure of $4,541.50 mentioned to you?

A Never.

Q I show you Plaintiff's Exhibit 7, designated as an estimate, and I ask you if until this trial began whether this was ever exhibited to you (handing)?

A Never, never.

THE COURT: Did Miss Broedy ever show you any drawings about what would be done in order to correct things in the bathroom?

THE WITNESS: Never.

Q Did Mr. Muller ever show you anything?

A Never.

Q Now about this time in 1962-- this is August, and in early 1962 that this estimate was supposedly submitted to the plaintiff, to Miss Broedy -- was there a

conversation between you and Miss Broedy as to where you should telephone her?

MR. DRIMMER: I object to that as being immaterial.

MR. WEIDLICH: Well, that has to do with the fact that Miss Broedy was taking on this job instead of her partner or employer, Mr. Sills, and she did not want the office to be notified.

THE COURT: What difference does it make? It may be relevant as to difficulty of getting in touch with Miss Broedy, if you want to develop it for that purpose. You have already said that the witness couldn't reach her.

BY MR. WEIDLICH:

Q Exhibit 7 is dated August 10. After that were you able to reach Miss Broedy by telephone or otherwise concerning the bathroom work.

A I was able to leave messages at the Sills place and at her home, and sometimes she returned the call, and I must say most of the times she did not but when she did return the call the topic of conversation was the bathroom.

Finally, my calls became fewer and fewer between because when I called I didn't get results.

Q And almost a year later you received a letter from Mr. Muller that was testified to yesterday?

A Yes, I did.

Q Do you know the date of that?

THE COURT: June, 1963.

Q That is June, 1963, isn't that correct?

MR. WILLIAM WEIDLICH: It is Exhibit C.

A Yes.

Q And --

MR. DRIMMER: Is that Exhibit C in evidence or is it for identification?

MR. WEIDLICH: In evidence.

THE COURT: It is in evidence.

Q Subsequent to the receipt of this letter did you take up the substance of Mr. Muller's letter with Miss Broedy?

A I don't believe so. By this time we were having practically no contact.

Q That is, in June, 1963?

A That is correct.

THE COURT: May I see that, please?

(Mr.Weidlich hands to the Court who examines.)

Q Can you say when you last saw Miss Broedy in your apartment in New York?

A I believe it was the early part of '63.

THE COURT: Did you know that Mr. Muller was doing some work with respect to the bathroom?

THE WITNESS: No.

THE COURT: Was that the first you knew about his having anything to do with it?

THE WITNESS: I can't say that because I -- I remember his face yesterday, and I do believe that he was in my apartment with Mary, but the end result of this is news to me.

Q Were you ever notified by either Mr. Muller or Miss Broedy that the Italian marble had arrived in this country?

A Never.

Q Did anybody tell you anything about the cost, including the price for the fixtures and also the labor?

A They did not.

Q On these various items, near the end of plaintiff's answers to interrogatories, under date of 12/26/63, one double bench for piano was supplied by Miss Broedy, according to the statement. At that time did you see her?

A No.

Q Under date of 5/15/64, invoice No. 54, the statement is made that one poys bench recovered..

Is that a piano stool, do you know, Miss McGuire?

A No. The piano stool was a double thing. I

wouldn't know what this thing is.

Q Well, the date is given as 5/15/64. At that time did you see Miss Broedy?

A I did not.

THE COURT: Had you ordered this double bench for the piano?

THE WITNESS: It could have been. It was ordered maybe six months before.

You mean the double bench for the piano?

THE COURT: Yes.

THE WITNESS: Yes, I am sure it was because I remember that my sister and I needed this for rehearsal purposes to learn our arrangements, and I remember the stool.

Q How would you make the order -- by telephone, do you think?

A Probably one of the last times I saw her. I ordered it, is probably the way it happened.

Q Did you hear the testimony about two Oriental rugs that were taken from your apartment?

A Yes, I did.

Q What were those rugs? How would you describe them?

A Well, I believe in the testimony given previously

that it was stated they were threadbare and that I didn't want them. I liked the rugs and I wanted them. And they weren't threadbare. We had discussed where they should be put in the apartment, and they really weren't the proper size, so Miss Broedy suggested that she put them in storage until I decided what I wanted to do with them, and while I was in London she sold them, and when I came back she told me she sold them.

Q And was there any offer to pay you for them?

A None.

Q And where was the subject left -- just up in the air?

A It was, as it is in the air now.

THE COURT: Did she tell you for how much the rugs had been sold?

THE WITNESS: At that time I don't remember. I was really very upset over the fact that they were gone and sold, and I just couldn't believe it.

THE COURT: Well, meanwhile other rugs had been delivered to take the place of those rugs?

THE WITNESS: Yes. The rugs -- the two that were described, but I would like to add that one rug was a bedroom rug and the other was a very small rug -- it was just a foyer rug, an oval rug.

Q Are we talking about the rugs referred to in invoice No. 45 -- one bedroom rug and one foyer rug?

A Foyer rug, that is correct.

Q Did you ever receive a statement or invoice for those rugs in the amount of $2,641.95?

A No. I don't remember any such figure. I do remember Miss Broedy saying for me not to worry about it, that she would make it right.

THE COURT: I am not sure about this -- did Miss McGuire get an invoice for those two rugs? Is that among the 22?

MR. WEIDLICH: No, that is not. That is No. 45, handwritten, which has been supplied just about two weeks ago to me but never to the plaintiff.

MR. DRIMMER: Well, that is your recollection of the testimony. May I set forth my recollection of the testimony is that she passed certain invoices that she has, that she produced; that there may have been others that she doesn't have. That has been her testimony.

THE COURT: The witness said she never received such an invoice.

MR. DRIMMER: She says she does not recall having received an invoice for the rugs.

MR. WEIDLICH: No, she testified that she hasn't

for the rugs.

THE COURT: Well, what is it, Miss McGuire? What is your recollection as to whether or not you received an invoice?

THE WITNESS: I don't recall receiving an invoice, and I don't believe I did.

MR. DRIMMER: I move to strike out the latter part of the answer. She doesn't recall.

THE COURT: No, we will let it stand. That is the best she can say.

BY MR. WEIDLICH:

Q I believe you have testified as to payment of the rent up to October 1st of 1968 on your apartment in New York, is that correct?

A That is correct.

THE COURT: Your lease ran until the end of September, 1968?

THE WITNESS: Yes, sir.

MR. WEIDLICH: No; the lease --

MR. WILLIAM WEIDLICH: The lease with options.

MR. WEIDLICH: -- with an option to renew in 1966 for one year, and I believe Miss McGuire testified she was a holdover -- she was a tenant who hadn't signed up. She was away, and she paid the rent for the following year

when the new tenant went in, up to 1968, but we haven't been able to find any lease.

BY MR. WEIDLICH:

Q Is that correct, Miss McGuire, you paid the rent --

A Well, I explained that yesterday. I was leasing the apartment for a year at a time, and Mr. Ausnit notified me that my lease would be up if I did not notify them that within a certain period of time, to give them the right amount of time to show the apartment, to rent it to someone else, then I was automatically in for one more year -- that's the way it was.

THE COURT: Did you give them some kind of notice so that the lease was ended at the end of 1968?

THE WITNESS: Yes. Mr. Ausnit knew, and they showed the apartment and it was rented immediately --

Q That is Ausnit?

A Ausnit -- Peter Ausnit.

Q By the way, when do you recall, if you do recall, receiving the rent deposit -- the deposit for rental security -- the security for the rent and the interest from the landlord for the year?

A It was sometime quite a bit later after I left New York. It was at least a year later, I believe. I

remember it took some time to get that.

Q Now for the year 1967 can you tell us whether or not you filed tax returns with the Internal Revenue Service and with the New York State Taxation Department from your New York address?

MR. DRIMMER: I object to that. The tax return is the best evidence.

MR. WEIDLICH: Your Honor, it is not a question of whether --

THE COURT: No. I think the wttness can state if she knows. However, if tax returns are available and they are not produced that might go to the weight of her evidence.

(Question read.)

A I made a call to my offices in Denver last night--

MR. DRIMMER: I object to any telephone calls or any information she received from her office in Denver.

MR. WEIDLICH: It was suggested by your Honor, I think, that we try to get this information if we possibly could.

THE COURT: I will permit the witness to say it, by what means, if her recollection as been refreshed on this fact.

A In 1967 my taxes were filed as a New York resident.

THE COURT: For the year 1966?

THE WITNESS: All of the years before; since 1952 up until 1967 I always filed and only filed --

THE COURT: You understand you would not file for the year 1967 until the spring of 1968.

THE WITNESS: That's correct. Well, that is what I was going to go into.

THE COURT: All right.

THE WITNESS: In 1967 it was New York State filed, as a resident, New York resident.

In 1968 it was -- I filed as non-resident because --

MR. DRIMMER: I object to "because."

THE WITNESS: Okay, I will restate it -- boy! That "because" is something!

THE COURT: Just say what you did.

THE WITNESS: Okay.

In 1968 I was filed as a non-resident, meaning that --

MR. DRIMMER: I object to what it means.

THE WITNESS: Conjunctions are out, huh!

In 1969, before April 15th, you have to get your 1968 tax thing in, so since I left New York in September of 1968 I was no longer a resident of New York. I was then a

resident of Nevada. That is why in 1968 my taxes were filed non-resident, because I had removed myself physically, mentally, spiritually and every other way from the State of New York.

Is that allowed?

MR. WEIDLICH: May we have Plaintiff's Exhibit 8 admitted.

(Mr.Drimmer hands to Mr. Weidlich.)

BY MR. WEIDLICH:

Q I show you this exhibit and ask you if you recall having received -- you now recall having received that letter from Miss Broedy (handing)?

A (After examining) I don't remember it.

Q It is dated November 5, 1966.

THE COURT: What is the exhibit number?

THE REPORTER: Exhibit 8, your Honor.

Q Did you or did you not reach an adjustment or a balance on your account with Miss Broedy?

A We did not.

MR. WEIDLICH: That is all.

* * *

* * *

Q You testified that you called your office and you found out that for the year 1967 you filed taxes as a resident of the State of New York, is that right?

A That is correct.

Q And that for the taxable year of 1968 you filed a non-resident return?

A Correct.

Q Now you recognize -- I think that the Court indicated to you -- that the 1967 return is filed in 1968?

A That's right; before April 15th of '68 you file on the '67.

Q That is right.

A Yes.

Q And therefore in 1968 you filed a return as a resident of the State of New York for the year of 1967?

A That's correct.

Q That is correct. In 1967 you were a resident of the State of New York, at least until July, is that correct?

A Yes.

Q And therefore you rightfully filed a return as a resident of the State of New York in 1968 for the taxable year 1967?

MR. WEIDLICH: Just a moment.

A No, that is not correct.

MR. WEIDLICH: Did you say you filed in 1968? The question is confusing to me. Read the question.

(Question read.)

MR. DRIMMER: Well, that is correct.

MR. WEIDLICH: Yes, you have answered the question

that it is correct, Miss McGuire.

THE WITNESS: No.

MR. WEIDLICH. You filed in 1968 for 1967.

THE WITNESS: That is correct.

MR. WEIDLICH: Yes.

* * *

* * *

Q Miss McGuire, did you give the accountant the same information that you gave to Mr. Weidlich when he in his affidavit stated that you removed from your residence in 1967?

A I didn't move from my residence in 1967.

Q You heard me read the affidavit that Mr. Weidlich made that you had removed from your New York apartment in

1967.

A Well, that is not true. I moved in 1968.

Q Now did you give this same infomation to your tax accountant --

A Of course I did, and I did what any tax attorney and accountant tells me to do.

MR. DRIMMER: That is all.

A (Continuing) He was fully aware of where I was and when I left and where I went to, and fully aware.

Q And therefore he filed a non-resident return in 1968?

A That is exactly correct.

MR. DRIMMER: That is all. No further questions.

* * *

MR. WEIDLICH: For the convenience of the Court, we have gone through all of our own exhibits that we produced, down to number 26, and the other by number up to 51, and I think that rather than trying to work with the exhibits themselves, the invoices, we can more easily work with this, if the Court has no objection. I have the numbers or the invoices on the side.

MR. DRIMMER: Mr. Weidlich, may I know what the "this" is?

MR. WEIDLICH: This is the answers to the interrogatories in the case, with the numbers of the invoices on the side.

MR. DRIMMER: Do you have a copy for me?

MR. WEIDLICH: I will see if we have another one.

MR. DRIMMER: You don't have a copy for me?

MR. WEIDLICH: I am making up one, Mr.Drimmer.

MR. DRIMMER: Off the record.

(Discussion off the record.)

(Mr Weidlich hands.)

THE COURT: Mr. Drimmer, I think you had better look at what counsel has handed me to see if it is the same.

MR. WEIDLICH: Here is am exact copy of that, a photostatic copy(handing).

BY MR.WEIDLICH:

Q The first work done by you was what, according to

your answer to the interrogatories?

A Well, the first work done was I ordered fabric to cover a chaise lounge and a chair, a rocking chair. Then I ordered a desk, a sofa bed, some chairs.

Q Would you look at the second item there, with the date 12/23/64.

A (After examining) That should have been 1961, yes.

Q That should be December 23rd, 1961?

A Yes. This a chaise lounge and one rocking chair recovered with fabric, Scotchgard.

Now, the cable that I received from Miss McGuire pertained to the fabric to be used on this chaise lounge and rocking chair. I had sent her some samples to London, and she sent a cable to me to go ahead, that being choice number one, if you have the cable, pertaining to this lounge and rocker.

Q Were they both reupholstered?

A Yes.

Q Did Mr.Sills do the same work for her, do you know?

A Well, she purchased a chaise lounge from Mr. Sills some time in 1959.

Q Was the rocking chair reupholstered?

A Not in 1959.

Q By Mr. Sills?

A No, I don't think so.

Q Well, I show you what purports --

A I don't recall.

Q -- to be invoices of Mr. Sills, No. 4082 and No. 4989A, and I ask you if they refer to the rocking chair and the chaise lounge?

A (After examining) Yes, this was in 1960.

Q How much was that for?

A The rocking chair was 160 without the tax, and $450 -- $160 for recovering the rocking chair in 1960; $450 was for the chaise lounge that was purchased in the raw, upholstered to Miss McGuire's specifications.

The 1960 was not a reupholstery -- that was an original purchase.

Q By you -- oh, Sills was not --

A Yes, that was an original purchase.

Q But the rocker recovered by you is included in the price of $367.20, isn't it?

A Yes.

THE COURT: In other words, that was additional work that was done on the rocker?

THE WITNESS: Yes, your Honor.

If I remember correctly, it was done in a yellow, and then we decided to do it in a sort of aqua or turquoise.

MR. WEIDLICH: I offer those invoices of Mr. Sills No. 4082 and No. 4989A, in evidence.

MR. DRIMMER: Before I raise objections or consent to them going in, could you show me the invoice that this purports to be a duplication of? I think if we can tie one in with the other it would simplify matters.

MR. WEIDLICH: It is number 8,

THE COURT: The one under discussion, I gather.

MR. DRIMMER: May we take out number 8 of the original invoice and possibly have that marked with a letter after the number so that we can compare the two?

This is merely a suggestion I am making for the convenience of the Court, and I think for all parties.

THE COURT: I do not see the need for it yet, Mr. Drimmer. Go ahead.

MR. DRIMMER: All right. Then I have no objection.

(Defendant's Exhimit F received in evidence.)

BY MR. WEIDLICH:

Q Miss Broedy, going down to item 13 on my numbered list here --

A Yes.

Q -- would you give the date of that invoice.

A February 7, 1962.

Q And what was that?

A That I do believe was an 8-arm -- a bronze Empire chandelier that was hung -- that replaces a smaller chandelier that was hung over the bridge table in one corner of the living room.

Q And the date is February 7, 1962?

A Yes.

MR. DRIMMER: Would you rather refer to the original invoices to check whether these dates are there?

THE WITNESS: Yes, here it is. As a matter of fact, Miss McGuire and a friend of hers went to the store with me to look at this.

Q I did not ask you any questions.

Now I show you invoice No. 4812 of Dudley Sills, and I ask you if you worked on that chandelier referred to therein (handing)?

A Yes.

Q What was that?

A That was also a bronze chandelier, a much smaller one.

Q Where was it put?

A That was also installed over the card table but we wanted something more important, so this was removed and

replaced by this one (indicating) number 13.

That also included electrical work where they had to --

MR. WEIDLICH: I offer invoice No. 4812 in evidence.

MR. DRIMMER: No objection.

(Defendant's Exhibit G received in evidence.)

BY MR. WEIDLICH:

Q Miss Broedy, was the apartment painted while you were acting for Miss McGuire?

A Yes.

Q And where is that charge?

MR. DRIMMER: I object to that question. If he can point it out --

Q Well, look opposite number 34 under the date of 6/23/62.

A (After examining) Yes.

Q Did that cover the whole apartment, that item of $1,040?

MR. DRIMMER: May we see the invoice that would refresh her recollection?

MR. WEIDLICH: You have the invoices there.

MR. DRIMMER: Well, these are not in order. They are all over the place as you have given them to me.

THE COURT: Well, take a minute to look through them.

MR. DRIMMER: What is the invoice number?

MR. WEIDLICH: Of Sills?

MR. DRIMMER: Yes.

MR. WEIDLICH: I have not offered the Sills one. I have not referred to that. I am asking what she did-- hers is first.

MR. DRIMMER: Oh, that is hers.

MR. WEIDLICH: Yes.

MR. DRIMMER: Oh, I am sorry.

MR. WEIDLICH: There is no number.

A (After examining) Well, the painting -- we papered the foyer, the hallway, the den, the den bathroom; bedroom border -- that's the upper part near the ceiling -- and the bathroom -- master bathroom.

We also had to prepare the walls and remove some old paper that was there.

As a matter of fact, the paper that was hung -- the border that was hung in the bathroom was the exact pattern of the French curtains that were hung in Miss McGuire's bedroom, and also the foyer -- the paper in the foyer entrance matched various items. They were made-to-order papers.

Q And the total charge was $1,040?

A $1,040.

Q Now did Mr. Sills paint the apartment?

A I don't recall.

Q I show you this invoice and I ask you if that refreshes your recollection (handing).

A (After examining) Could be, but this was primarily for --

MR. WEIDLICH: I offer it in evidence.

MR. DRIMMER: No objection.

(Defendant's Exhibit H marked in evidence.)

THE COURT: What is the amount of that?

MR. WILLIAM WEIDLICH: $685 even.

Q Going back now to the work first done --

MR. DRIMMER: What was the date of that Sills invoice?

MR. WILLIAM WEIDLICH: I am reading from Exhibit H and it is dated July 3, 1959.

MR. DRIMMER: And this invoice is dated June 23rd, 1962.

MR. WEIDLICH: That is item number 8 -- the invoice numbered 8 which you agree that the date is 12/23/63 --

THE COURT: No, '61.

THE WITNESS: '61.

Q 12/23/61 and not 12/23/64.

A Right.

Q That is the only work you did, or did you do anything else at that time, according to that invoice?

A Well, hardly. You see, I didn't see Miss McGuire until October, and by the time merchandise is ordered and put into work nothing could have been delivered before '62.

Q Doesn't your invoice, invoice No. 8, refer to vase or vase decorations?

A Yes. That was something that could have been done.

Q Those transactions are the only ones in 1961, isn't that correct?

A It could have been, yes.

THE COURT: You said number 8, but on this list it is 9 and 10 -- is that what you mean?

MR. WEIDLICH: Yes, that is correct.

MR. DRIMMER: Invoice No. 8 is for the chaise lounge. Invoice 9 and invoice 10 is decoration restored on white opaline vase.

MR. WEIDLICH: That is correct.

Q What is the date of that?

A That is December -- December 26th.

Q For No. 9 and No. 10?

A Right.

Q Now the following month, for January, 1962, there were a number of items, were there not?

A Yes.

Q In fact, does your invoice show the number?

A Which items are you referring to?

Q Invoice No. 11.

MR. DRIMMER: Here it is (indicating).

A Yes.

Q What were those items?

A They were the imported French curtains for the master bedroom. They all had underlinings of yellow antique taffeta. The underlinings were lined, and of course there was a double installation of drapery rods.

Q With regard to those items did you exhibit any of them to Miss McGuire before they were installed?

A Oh, most naturally, sir.

Q Well, did you?

A Yes.

Q In each instance?

A They were shown to Miss McGuire.

Q For each transaction you exhibited them to her, did you?

A Yes.

Q Where was this?

A At her apartment.

Q I mean before they were picked out you did not take her to pick them out or see them?

A No; I brought them to her, I believe.

Q You had them all delivered.

A Yes.

Q She did not see the curtains or the draperie before you took them --

A She saw them before they were completed. I showed them to her as they come in from overseas.

Q What about the sofa bed?

A She had a sketch of that.

Q And is that true of the desk chair?

A Yes.

Q And the desk table?

A Yes.

Q The desk -- you saw pictures of them rather than the things?

A Well, yes, because Miss McGuire could never go with me to the various showrooms. This required a lot of time, and, as we say in the trade, an awful lot of leg-work.

Q But these transactions were separate and apart

from the others, were they not?

MR. DRIMMER: I object.

Q You showed her each item?

A As everything was shown, yes.

MR. DRIMMER: Is this a sketch similar to that (indicating)?

THE WITNESS: Yes, one of them. I mean the sketch would have been something like this as an example (indicating).

MR. DRIMMER: May I offer this in evidence?

Q Something like it?

A No; but what I am trying to bring out is that this is a sketch of a table that I showed her before we made it.

Q I am trying to show how you operated.

A I had sketches made.

Q In all instances?

A Of furniture pieces mostly.

Q And did Miss McGuire approve each thing individually, each item?

A Yes.

Q Some of them she did not like?

A Anything that I invoiced Miss McGuire she liked and she kept.

I stated yesterday that anything she did not like I removed from the premises-- she was never invoiced for it

Q Now going back to February, invoices 12, 13 and I believe 14, the first of those items is the removal of a crystal chandelier.

Do you have that before you?

A (After examining) Yes.

Q And the next item is oneDore bronze chandelier?

A Yes.

Q For that operation did you work with Miss McGuire?

A Very simply.

Q How was that?

A Miss McGuire had received a huge chandelier -- if I remember correctly, I think it was a 27 or 36-light chandelier for her dining room, and we had to remove a crystal chandelier in order to hang this other one.

We also hung a chandelier in her foyer. This is invoice No. 12.

Q And were you instructed with respect to the floor lamp or chandelier lamp, whichever it may be?

A On which, sir?

Q On Invoice 14.

A Invoice 14 was the Dore bronze fixture that was hung over the bridge table in the living room, to replace

the one that was purchased from Mr. Sills.

Q I have 14 as packing and shipping chandelier.

A Oh, packing and shipping chandelier to Miss McGuire's mother in Miamisburg, Ohio.

Q Now going to March of 1962, invoice numbered 15 and invoice numbered -- for towels -- I do not have the number here -- a total of $62.90.

A What is the number of the invoice?

Q That was given to me late. Do you have that number on the towels? I don't think it was referred to in the answers.

MR. DRIMMER: Does it have a number on here?

A Are you referring to 27 -- towels and spread?

Q $62.90, yes.

MR. DRIMMER: $62.90, plus tax, that is No. 27.

A No. 27.

Q Oh, yes, I have it. That is all that was done in March of 1962?

MR. DRIMMER: Wait a second, Mr. Weidlich. You have the invoice, and I think it is -- well, I will withdraw the comment.

MR. WEIDLICH: I don't have the invoice.

A $64.79 was the amount with the tax -- is that it?

Q With the tax, yes.

A Yes.

Q Nothing was done in April of that year, was there?

MR. DRIMMER: You mean there were no invoices sent in April -- that is what you mean, is that correct?

MR. WEIDLICH: No, I did not mean that. I am asking for the claimed work that was done in that month.

THE COURT: Are the dates on the left the dates which appear on the invoices?

MR. WEIDLICH: Yes, sir.

A There was legwork done, scurrying around, picking things up --

THE COURT: Miss Broedy, please do not volunteer. It will take us just that much longer. Just please answer the question.

Q With respect to No. 15, the date on your answer to interrogatories is March 12, 1961. That is incorrect?

A Yes, that should have been '62,

Q That should have been '62.

A Right.

Q Your invoices for June, if you will look at them, Nos. 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28 --

THE COURT: Not 28.

MR.WEIDLICH: No. 27 we had out of order, your Honor. That is the towels that should be in March, on the

second page -- it is March 24, 1962. That isn't a June item.

MR. DRIMMER: That is correct. That is a 27th-of-March item.

MR. WEIDLICH: Yes. 28, 29, 30 -- that takes us over to --

MR. DRIMMER: No,you have some more -- 33, 34, 35, 36 -- up through 36 for June.

MR. WEIDLICH: I am going just down to the shoe-boxes.

Q Do you have those, Miss Broedy?

MR. WILLIAM WEIDLICH: Which is No. 26.

MR. DRIMMER: What invoice are you referring to now?

MR. WEIDLICH: 26 --you are right. Then we go down to 28, nine tassels. Then for upholstery we have no invoice -- none has been given to us, 6/21/62.

MR. DRIMMER: Is it marked over there as a number?

MR. WEIDLICH: No, I haven't found it.

MR. DRIMMER: What entry do you have?

MR. WEIDLICH: Let us go on with the others -- we can come back to that. That is upholstery for closet. I have never seen that -- 6/21/62, No. 30.

Then 32, 33, 34, 35, 36 -- that is all June.

MR. DRIMMER: That is an invoice dated May 11th.

MR. WEIDLICH: No, I meant the upholstery. We don't have an invoice for that.

THE WITNESS: Upholstery for what?

Q For closet, is all you say in the interrogatories.

A Well, that is the vinyl that was hung in the closet. It was an upholstery vinyl.

MR. DRIMMER: What number is that?

THE WITNESS: There is no number on that.

MR. WEIDLICH: I think that is No. 29 that you said was missing.

Q Now, Miss Broedy, all of those items, that was considerable miscellaneous matter, was it not, that you did in June -- and I figure it came to over $5,000?

A Uh-huh.

Q Would you say that is correct?

A Well, I'll see.

MR. DRIMMER: The addition is not involved. The invoices are over here, and if you have any objection to the invoices, rather than test her mathematical ability.

MR. WEIDLICH: All right.

Q Going to the next month, July, there is only one item, isn't that so -- one center bowl, bronze?

A And one jewel box.

Q And that came to $110?

A Right.

Q That is invoice No. 37?

A That is No. 37, right.

Q The next item jumps to August 10, 1962 on your answer -- that is the largest item, is it not?

A Yes, that is the bathroom -- the master bathroom.

Q And you have stated in there that it was ordered, did you not?

A Yes.

Q And no invoice was ever rendered for that?

A I told you --

Q I say, no invoice was ever rendered?

A No.

Q And no claim that it was installed was made, was there?

A No.

Q Yesterday Mr. Muller referred to the estimate in that amount which he had compiled for the marble fixtures and furnishings, Exhibit 7.

Was that ever shown to Miss McGuire?

A Yes.

Q When?

A It must have been in July or August.

Q Would it be in July before the estimate was drawn?

A Oh, yes, it had to be in July before the estimate was drawn.

Q How could the estimate be shown if it had not been prepared until -- and it is dated August 10, 1962?

A The bathroom that I had installed, for which I did not bill Miss McGuire because she was dissatisfied with it, was -- of course it was installed. Then I had Mr. Muller come up and he took all dimensions and measurements, and we laid this thing out and planned it, and then the estimate was drawn.

Q My question is, Was that estimate exhibited at any time to Miss McGuire?

THE COURT: Do you mean the physical piece of paper --

MR. WEIDLICH: Yes.

THE COURT: -- which is marked as an exhibit?

MR. WEIDLICH: No. 7, your Honor.

A Yes.

MR. DRIMMER: I have the exhibits here.

MR. WILLIAM WEIDLICH: Oh, you have your exhibit?

MR. DRIMMER: Yes.

MR. WILLIAM WEIDLICH: No. 7 is the estimate.

MR. DRIMMER: Here it is (handing).

Q But was that paper exhibited to Miss McGuire, to your knowledge?

A I believe it was.

Q And when?

A Well, it must have been sometime in July --

MR. DRIMMER: No.

MR. WILLIAM WEIDLICH: Please, Mr.Drimmer. You object to others --

A (Continuing) This is dated August the 10th, so it must have been shown some time after this was drawn.

Q Yes, it wouldn't be in July, then,would it?

A No.

Q Did you hand it to Miss McGuire or to anybody in her behalf?

A I believe so.

Q But you believe you gave it to her?

A I believe so.

Q And then took it away, is that it?

A Yes.

Q And did you explain it to her?

THE COURT: Wait a minute. You did not leave a copy of it with her?

THE WITNESS: No.

Q Do you know when your attorney gave that estimate to us, Miss Broedy?

A No.

Q You just heard here --

A No.

Q -- that he had given us some invoices?

A No, I knew that he had given it to you but I did not know just when.

Q Well, do you think it was last month?

A I couldn't say, sir.

Q You do not know whether it was last month or the month before?

A No; because with all the correspondence between you how would I know when this was given?

Q If you will pass down on the list to8/31/62, that contains, does it not, six invoices, No. 39 to No. 44 inclusive, which were supposedly for work done in August; is that right?

A That is for work which was done.

MR. DRIMMER: When you say "8/31" --

MR. WEIDLICH: August 31, 1962.

MR.DRIMMER: Yes. I think the dates there may not be correct because there are a number of invoices

dated August 28th.

THE COURT: I think you meant in the month of August, 1962 -- there are different dates.

MR. WEIDLICH: Yes.

Q Those are the miscellaneous items, except for the oriental chest, $679.50.

A Yes. Well, I won't say "miscellaneous items." There was the chest for the den; Foo dog; a swivel bench for the bathroom; pictures that were framed.

Q Well, I find that those items come to $982.70 --

MR. DRIMMER: Whatever the amount is.

Q -- without the tax.

A Uh-huh.

Q We come to the next item on your answer, the second largest -- one bedroom rug and one foyer rug, custom made, $2,641.95. That is undated.

MR. DRIMMER: It is dated May, 1962, isn't it?

MR. WEIDLICH: On your list it is undated.

MR. DRIMMER: Oh, I am sorry.

THE WITNESS: Uh-huh.

Q Was an invoice rendered for those items?

A Yes.

Q Would you take out invoice No. 45.

A I have a copy of it here, sir-- evidently the

original one was lost or mislaid.

Q When was that sent?

A That was in May or June, 1962.

Q What is the date? Isn't it dated?

A Dated for May.

Q In May?

A Yes.

Q But that may not be correct?

A If it wasn't May, it was in June, because I know we did not put the rugs down until after all the painting and papering was done.

Q Why is this copy you submitted handwritten?

A I just said I may have misplaced the original one that I had.

Q Were all of your invoices that you rendered, were they typewritten?

A Yes, the majority of them were, sir.

Q Then all of them weren't typewritten?

A Well, with the exception of maybe two or three they were all typewritten.

Q All that Miss McGuire produced on her deposition came down to number 26 -- they were all typewritten, weren't they?

A Yes.

Q And these additional ones now are the ones that you did not have, isn't that right?

MR. DRIMMER: I object to the question. How would Miss Brodey know whether she has it?

THE COURT: Yes, sustained.

Q Now passing to December of 1962, was there any invoices rendered or any work done in September, October or November?

A (After examining) No invoices. There was work done.

Q I refer you to invoices No. 46. No. 47, No. 48, No. 49, No. 50, No. 51 and No. 52, but you have none prior to -- oh, by the way, in your answer, No. 48, you have December, 1961. That is incorrect, isn't it?

A That should have been '62.

Q As far as these others where you have no date, your invoices show the actual date of December 15?

A What was that, sir?

Q Your answer has just December, 1962 for six invoices?

A Yes.

Q Are they dated?

MR. DRIMMER: Let the record show that the invoices, No. 40, are dated December 15 -- I mean No. 46 is

dated December 15.

No. 47 is dated December 15.

No. 48, December 15.

No. 49, December 15.

No. 50, December 15.

No. 51, December 15, and No. 52 is December, 1962, without a date.

THE COURT: Mr.Weidlich, the list that you have given me and which I have been looking at bears the notation on the second page over on theleft as to a considerable number of items "No bills sent." I take it that is the contention of the defendant?

MR. WEIDLICH: Yes.

MR. DRIMMER: This paper is not in evidence. It is merely for the convenience of the Court.

THE COURT: Well, we are going to mark it at some point.

MR. DRIMMER: Okay.

THE COURT: I just wanted to be sure I understood it.

MR. DRIMMER: Yes.

THE COURT: I think we will take a brief recess.

(Short recess.)

BY MR. WEIDLICH:

Q Miss Broedy, we are up to January, 1963, and the invoice number for January 12, 1963 is No. 56.

A (After examining) Yes; some pictures -- pictures that were framed.

Q Were they discussed with Miss McGuire?

A What do you mean "discussed"?

Q The type of frames?

A No.

Q You used your own judgment on that?

A Yes, on all picture framing.

Q On all picture framing?

A Yes.

Q When was the order given to have the pictures framed, do you know?

A Well, some of these pictures I do believe pertained to her command performance, and she had a whole batch of glossy prints that she gave to me and asked me to have them framed.

Q Any of these transactions -- any and all were oral, were they not?

A Yes.

Q And did you get the approval of Miss McGuire when they were framed -- would you get the approval?

A Well, I hung them all. They never came back.

Q But did you inquire of her if she liked them after they were hung?

A Yes.

Q We had no invoices in that year until May of 1963.

MR. DRIMMER: You mean May, 1964.

MR. WEIDLICH: No.

MR. DRIMMER: What invoice are you referring to? What number?

MR. WEIDLICH: No. 53.

MR. DRIMMER: No. 53 is dated May 15, 1964.

THE COURT: It is listed as being 1963.

MR. DRIMMER: Then it was an error.

MR. WEIDLICH: It is listed as 1963.

THE WITNESS: It should have been '64.

MR. DRIMMER: And the invoice that was sent to you is dated May 15, 1964 by my office.

BY MR. WEIDLICH:

Q Now going back, what was the last time that you think you saw Miss McGuire?

A In '64, early '64.

Q Did you see her in 1963 at all?

A Yes.

Q And in 1962?

A Yes.

Q And on those occasions when you saw her did you get approval of the items?

A Yes.

Q What?

A Yes.

Q Did you have a key to Miss McGuire's apartment?

A Yes.

Q For how long did you have that?

A About three years.

Q And you knew her telephone numbers?

A Yes.

Q She had professional numbers as well as personal, did she?

A I don't know. I usually -- every time I had gotten a number I jotted it down.

Q Do you know how many numbers she had?

A Offhand I couldn't recall.

Q You do not know whether there were one, two or three?

A It could have been five or six -- I don't remember, but I do know that there were a few.

Q Invoice No. 56, dated January 4, 1963, those are

the pictures that you referred to?

A Yes.

Q That was the only item in that month, and there was nothing until December of 1963, is that correct?

A (After examining) Yes.

Q That is invoice No. 55. What is the date of that?

A December 26, 1963.

Q And that is a double bench for piano?

A Yes.

Q That was a new bench.

A Yes.

Q Costing around $250 with the tax.

A Yes.

Q Now on your inventory, the nine pictures framed--on your answers, rather, there is the date of 1/64. That should be January,1963, should it not?

MR. DRIMMER: What is that number?

A 56?

Q 56.

MR. DRIMMER: 56, January 4, 1963.

Q Instead of January, 1964 on your inventory; that is correct, isn't it?

A Yes.

MR. DRIMMER: Well, the invoice is dated January 4, 1963.

MR. WEIDLICH: But your answers put it in 1964.

MR. DRIMMER: That is correct.

Q Now the final item is one bathroom chandelier plus installation, $76.95; and the date on your answer is January, 1964. What does your invoice show?

A June, 1962.

Q June 21, 1962?

A Right.

Q Now on invoice No. 53, the club chair shipped to Mrs. A. B. McGuire, there is a statement that the chair was kept in storage for more than one year; is that correct?

A Yes.

Q Why was it held so long?

A I just was not given any disposition of it until then.

THE COURT: What is this item -- No. 53?

MR. WEIDLICH: 53, yes, your Honor.

Q Well, it is stated that the receipt from the Railway Express is dated November 18, 1963 --do you see that?

A (After examining) It should have been 1964 -- no,

mkt Broedy-cross 178

wait a minute. Let me see.

(After further examining) Yes. The chair was picked up in 1962, and actually I didn't have the bill for it, and Miss McGuire's office wrote up the bill and it was when I received the bill that I billed Miss McGuire.

Q Did you bill her for the storage?

A No.

Q So that according to your answer to the interrogatories there are only two items, invoice No. 54, and invoice No. 55, which come after the six-year statute of limitations?

MR. DRIMMER: I object to that.

Q Well, I will say occurred in December of 1963 and May of 1964 -- there are only two items on your answer, is that correct?

MR. DRIMMER: Well, the record speaks for itself and I object to the question.

Q We have corrected these dates down here pertaining to 1964 which are not there -- there are four dates on the answer of '64, and the second item was wrong, and the two at the end of the answer in '64, both of those were erroneous. That leaves in December of '63 and May of '64 only two items reflected by invoices No. 54 and No. 55, is that correct?

MR. DRIMMER: I object to the question. I mean, the record speaks for itself, and there is no reason why this witness must give a recap.

THE COURT: Yes. I think counsel has correctly stated what I understand to be the facts relating to the items on this list.

* * *

PLAINTIFF'S EXHIBIT 1 - INVOICES #1-7, 8-26, 27-30, 32-37
39-57

183a

MARY R. BROEDY
Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

January 8th, 1962

Miss Phyllis McGuire,
525 Park Avenue,
New York City.

One (1)	Oriental sofa-bed-custom made down and foam seat down and foam pillows down and foam wedges Fabric-Scotch-guarded	925.00
One (1)	Swivel desk chair- black and gold finish-green silk back and seat	165.00
One (1)	Five-drawer desk-custom-made and custom finished in tortoise	525.00
One (1)	Oriental lamp table-black withgrooved striping	245.00
One (1)	Oriental lamp with pure silk shantung shade	95.00
One (1)	Oriental male figure lamp-hand carved wood mounting with pure silk shantung shade	200.00
Two (2)	Oriental chairs-teak finished frames-down and foam seats 50/50 down back pillows Fabric-Scotch-guarded © 295.00	590.00
		2745.00
	Sales Tax	82.35
		2827.35
	Delivery	30.00
		2857.35

184a

MARY R. BROEDY
Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

December 23, 1961

Miss Phyllis McGuire
525 Park Avenue
New York City

1 Chaise lounge reupholstered		
1 Rocker boudior chair "		
Covering Scotch-guarded		340.00
	Trucking	14.00
		354.00
	Sales Tax	13.20
		367.20

MARY R. BROEDY
Interiors

185a

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

December 26th, 1961

Miss Phyllis McGuire
525 Park Avenue
New York City

Decoration restored on one white opaline vase	10.00
Closet removed from den	50.00
	60.00

MARY R. BROEDY
Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

Invoice

January 8th, 1962 #1

Miss Phyllis McGuire
525 Park Avenue
New York City

Imported (French) curtains for bedroom;

All curtains have under-draperies of citron-yellow antique taffeta lined with polished cotton-

Curtains and under-draperies-double installation 1150000

Tax 34.50

1184.50

DOES NOT

This does [redacted] include cornices and wall-paper printed to match durtains.

187a

✓

MARY R. BROEDY
Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

February 7th, 1962 #1

Miss Phyllis McGuire,
525 Park Avenue,
New York City

Removal of crystal chandelier from dining-room
and re-hanging of brass and crystal chandelier

Chandelier hung in foyer

35.00

12 1

188a

MARY R. BROEDY
Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

February 7th, 1962 #2

Miss Phyllis McGuire,
525 Park Avenue,
New York City.

One (1) Doré bronze chandelier	450.00
Installation	5.00
	455.00
Sales Tax	13.50
	460.50

ARY R. BROEDY
Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

February 16th, 1962

Phyllis McGuire
525 Park Avenue
New York City.

Packing and crating of chandelier floor lamp and shade for shipment to Mrs. A. B. McGuire, Miamisburg, Ohio 68.50

Prepaid charges 23.63

92.13

porinvoice from Beverly Storage Co Inc.

MARY R. BROEDY
Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

March 12, 1962

Miss Phyllis McGuire,
525 Park Avenue,
New York City.

Four (4) switch plates (living-room, bedroom, foyer and hallway)	@ 2.50	10.00
One (1) Oriental switch plate (den)		7.50
One (1) Aftaba cigarette lighter (den)		3.50
One (1) Oriental ash tray-green (den)		1.50
Four (4) pictures framed		29.25
One (1) clock radio		29.95
42 bulbs	@ .70	29.40
		119.60
	Sales Tax	3.56
		122.16

S/B 111.10
356
11464

MARY R. BROEDY
Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

June 1, 1962

Miss Phyllis McGuire
527 Park Avenue
New York City.

Six (6) doors-repaneled	@ 60.00	360.00 ✓
	Sales Tax	10.00
		370.00 ✓

192a

ARY R. BROEDY
Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

June 14th, 1962

Miss Phyllis McGuire,
525 Park Avenue,
New York City.

Carpet installed in den and den hallway		
29 3/4 yds @ 16.50		490.88 ✓
Vynl flooring in kitchen		132.00 ✓
		622.88
	Sales Tax	18.69
		641.57
		641.57 ✓

193a

MARY R. BROEDY
Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIvoli 2-3986

June 14th, 1962

Miss Phyllis McGuire,
525 Park Avenue,
New York City.

Two (2) custom-made Oriental window frames
Base cabinets built down to floor with
Oriental legs; one cabinet opening with
shelf for storage and one cabinet to conceal
radiator. 454.00 ✓

Curtains installed on above;
fabric, labor, rods and installation 32.00
486.00
Sales Tax 14.58
500.58 ✓

18 ✓

194a

MARY R. BROEDY
Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIvoli 2-3966

June 15th, 1962

Miss Phyllis McGuire,
525 Park Avenue,
New York City.

Two (2) sections added to 64" dresser, custom made to fit onto both ends so that it looks like a one-piece 132" dresser	600.00
Marble top to fit above dresser -cove edge	230.00
Two (2) marble tops for nite-tables	100.00
	930.00
Sales Tax	37.20
	967.20
Pick-up and redelivery of above	20.00
	985.90

195a

MARY R. BROEDY
Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

June 15th, 1962

Miss Phyllis McGuire,
525 Park Avenue,
New York City.

Window-guards installed in
bedroom
bathroom
den

	150.00
Sales Tax	4.50
	154.50

196a

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Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIvoli 2-3986

June 18th, 1962

Miss Phyllis McGuire,
525 Park Avenue,
New York City.

Custom-made shelves for shoes installed facing bedroom window-

	195.00
Sales Tax	5.85
	200.85
Delivery	8.00
	208.85

197a

MARY R. BROEDY
Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

June 28th, 1962

Miss Phyllis McGuire,
525 Park Avenue,
New York City.

One (1) Empire table custom-made to fit back of Racamier love-seat		265.00
One (1) Imported Bergere chair- Decoratedfinish and upholstered with imported patterned cut velvet-		365.00
		630.00
	Sales Tax	18.90
		648.90
	Delivery	7.00
		655.90

22

198a

MARY R. BROEDY
Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

June21, 1962

Miss Phyllis McGuire,
525 Park Avenue,
New York City.

Turquoise vynl for guest closet and shelves in bedroom closets		
10 yards @ 4.64	46.40	
installation -guest closet	33.00	
		79.40
Orange vynl for shelves in den and hall-closet		
5 yds @ 4.64		23.20
no installation		
		102.60
Tax		3.09
		105.69

23 c

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Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

June 23, 1962

Miss Phyllis McGuire,
525 Park Avenue,
New York City.

Two (2) full shower curtains with linners for den bathroom	6.00	12.00
One (1) window curtain for den bathroom		6.00
One soap dish		.79
		18.79
Sales Tax		.57
		19.36

200a

Not on list

MARY R. BROEDY
Interiors

1024 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

June 22, 1962

Miss Phyllis McGuire,
525 Park Avenue,
New York City.

60	quilted clip hangers	@ 1.05	63.00
36	quilted gown hangers	1.95	70.20
192	quilted hangers	.60	115.20
1	quilted box to fit under window shoe-rack		15.50
			263.90
		Sales Tax	7.92
			271.82

201a

MARY R. BROEDY
Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

June 29th, 1962

Miss Phyllis McGuire,
525 Park Avenue,
New York City.

72 Plastic shoe boxes 0.53 38.16
tax 1.15
39.31
1.50
4.50
43.81

boxes 29.93
freight 3.65
delivery 4.58
38.16

26

202s

MARY R. BROEDY

Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIvoli 2-3986

March 24, 1962

Miss Phyllis McGuire,
525 Park Avenue,
New York City.

9 towels white/gold 2 face cloths 1 bath mat	25.40
1 bedspread for dual bed	37.50
	62.90
Sales Tax	1.89
	64.79

203a

MARY R. BROEDY
Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

May 11, 1962

Miss Phyllis McGuire,
525 Park Avenue,
New York City.

9 gold tassels-key tassels	@ 3.75	33.75
Sales Tax		1.02
		34.77

Henry & Brierly
1064 Monroe
Brklyn NY

June 11, 1962

Jas Phyllis & Jane
1 W 88 St
NYC NY

Bathroom carpet (-den) 6 x 10
TPR 187
6/37.

MARY R. BROEDY
Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

205a

June 21, 1962

Miss Phyllis McGuire,
525 Park Avenue,
New York City.

Vynl for foyer
Vynl for hallway 182.29

26 yds White shikki border for bedroom
12 yds White vynl for bathroom printed to match bedroom curtains and border for wall
18 rolls White shikki silk for den 396.30
578.59

Tap 578.59

2011

d

206

MARY R. BROEDY
Interiors

1084 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

June 21, 1962

Miss Phyllis McGuire,
525 Park Avenue,
New York City.

8 rolls Kiln for don bathroom 51.38 ✓138
Sales Tax 1.60
~~52.98~~
✓59✓

Van Lines NY W37✓
6/27/62✓

207a

4

MARY R. BROEDY
Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIvoli 2-3956

June 22, 1962

Miss Phyllis McGuire,
525 Park Avenue
New York City

4/2/62

36 bulbs	@ .70	25.20		
18 bulbs	.75	13.50	28.70	
	Fed Tax		2.61	
	Sales Tax		.80	
				32.11
1 Yellow hamper				10.28
1 Rubbish can				9.79
30 bulbs	@ .70		21.00	
	Fed tax		2.10	
	Sales Tax		.63	23.73
				75.81

Hf's Exh 5 - today's data
called for Id

208a

MARY R. BROEDY
Interiors

1084 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

4

June 2?, 1962

Miss Phyllis McGuire,
525 Park Avenue,
New York City.

Paperhanger's cost for
Foyer
Hallway
Den
Den bathroom
Bedroom border
Bathroom 440.00

Painters cost for painting
and removing paper where
necessary and preparing
walls for paper-hanger 600.00

$1040.00

209a

MARY R. BROEDY

Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

June 28th, 1962

Miss Phyllis McGuire,
525 Park Avenue,
New York City.

Five (5) pictures framed 24.00
Sales Tax .72

24.72

1 all gold
1 gold/blue
1 gold/brown
1 black
1 black/gold

MARY R. BROEDY
Interiors

1084 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIvoli 2-3986

10a

X

June 28th 1962

Miss Phyllis McGuire,
525 Park Avenue,
New York City

Paid to Langston for installing kitchen shelf for radio shelf in kitchen closet shelf in bedroom closet shelf in foyer closet	12.00
Installation of chandelier in bathroom-outlet	20.00
	32.00

211a

MARY R. BROEDY
Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

July 3, 1962

Miss Phyllis McGuire,
525 Park Avenue,
New York City.

1 Bronze bowl for foyer table	55.00
1 French jewel box for bedroom dresser	55.00
	110.00
Tax	3.30
	113.30

212a

MARY R. BROEDY
Interiors

1084 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

[illegible] 20th, 1962

Miss Phyllis [illegible]
225 Park Avenue
New York City.

1 [illegible]" Oriental chest with [illegible] top drawers and record stacks at bottom left side.
Custom finished to match Holland scheme in room

	650.00
Delivery	10.00
	660.00
[illegible] Tax	19.50
	679.50

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MARY R. BROEDY
Interiors

213

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIvoli 2-3986

August 24th, 1952

Miss Phyllis McGuire
525 Park Avenue
New York City.

1 Pair Hose 13.50
1 Scarf 1.50
15.00
Sales Tax .63
21.63

214a

MARY R. BROEDY
Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE Tivoli 2-3986

[illegible] 24th, 1962.

Miss Phyllis [illegible]
525 Park Avenue
New York City

2 Roman swivel heads for bathroom, Antique white/gold yellow gold		91.00
[illegible]		5.82
		96.82

215a

MARY R. BROEDY
Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

August 28th, 1962

Miss Phyllis McGuire,
625 Park Avenue,
New York City.

1 Double pinleat frame covered in fabric to match chairs and chair		27.50
1 Frame for artist's pictures		c/o
4 9½x11½	3615	4.15 16.60
4 9½x11½	3497	4.15 16.60
1 10½x13½	4032	composition 16.75
1 9½x11½	3496	4.15
3 8x10	3615	4.02 12.06
1 8x10	3615	1.90
1 11½x13½	3557	6.15
1 11½x13½	4076	5.00
2 8x10	3557	8.04
2 8x10	3496	4.02 8.04
1 8 1/4x11½	4017	4.08
1 8 3/4x10 3/4	3615	4.02
1 9 3/4x11½	3615	4.15
1 4 7/8x8 1/8	3496	1.70
		127.70
	Sales Tax	4.90
		132.60

127 ✓
17 12
144 ✓

216a

MARY R. BROEDY
Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIvoli 2-3986

August 31, 1962

Miss Phyllis McGuire
525 Park Avenue
New York City

1 Yellow bath mat 9.50
1 Turq. bath mat 7.50
17.00
Tax .51
$17.51

217a

MARY R. BROEDY
Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

August 31, 1962

Miss Phyllis McGuire,
525 Park Avenue,
New York City.

10 down Lotus Plated
Re-Installed 2.75 57.50

$57.50

- wyth Duchy
1064 damask Cur
damask Rug 10472

July 1064

Regle de Cour-
ive + Cur-
Sc/c.

- Imperial Oriental rug for
foyer entrance - pattern is
mostly pink/purple - colors are
selected

- Imperial Oriental rug for
bedroom - pattern is hard to
match wallpaper - colors are
selected

10/30/12

219a

MARY R. BROEDY

Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIvoli 2-3986

[illegible] 25, 1963

[illegible]

[illegible]

[illegible]

135.00
[illegible]

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220a

MARY R. BROEDY
Interiors

1084 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

December 15, 1962

Phyllis Nebelung
625 Park Avenue
New York City.

2 37" [illegible] conference table
with [illegible]

Textured Finish

$80.00
[illegible]
[illegible]
$97.00

$97.00

MARY R. BROEDY

Interiors

221a X

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIvoli 2-3986

[illegible] 15, 1962

[illegible]

[illegible]

[illegible]

[illegible]

97.85

97.85

11

222a

MARY R. BROEDY
Interiors

1084 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIvoli 2-3986

September 15, 1962

[illegible]

2	9½ x 11½	[illegible]	13.50
1	15 x 12 1/8	[illegible]	5.25
1	Large plastic shelving with [illegible] and mat glass		22.50
1	11½ x 16½ Chrome (Dial)		7.50
1	11 3/8 x 13 1/2 (Bedroom)		3.50
		[illegible]	[illegible]
			97.32

223a

X

MARY R. BROEDY
Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE: TIVOLI 2-3986

[illegible] 15, 1962

[illegible]

1. 100 x 122½ [illegible] 63.50
2. 100 x 122½ [illegible] 65.75
3. 100 x 122½ [illegible] 65.75
4. 100 x 122½ [illegible] 65.75
5. 100 x 122½ [illegible]
@ 25.75

[illegible] Tax

263.12

= 80.✓

MARY R. BROEDY
Interiors

1084 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIvoli 2-3986

[illegible] 15, 1942

[illegible]
[illegible] Park Avenue
New York City

[illegible]

[illegible] 20.00
[illegible] 4.00
24.00

ONLY COPY AVAILABLE

Survey for Brady
1969 Survey Co
Survey Co

December 1967

Thurs Phyllis & Laura
Park Co
Survey Co

Carpet for bathroom
(Carter)

69 ~~00~~ 76
Trip 2
71 76

226a

MARY R. KENNEDY
Interiors

1084 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

May 15, 1964

Miss Phyllis McGuire
525 Park Avenue
New York City

One (1) club chair, shipped to
Mrs A. B. McGuire
Miamisburg, Ohio
via Railway Express
Receipt #62-53-55 11/18/62

Trucking - pickup at 525 Park Ave	5.00
Packing for shipment	12.00
Delivery to Railway office	5.00
	$22.00

3

This chair was kept in storage for more than one year.

227a

MARY R. BROEDY A.S.I.D.
Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIvoli 2-3986

June 15th, 1964

Mrs Phyllis McGuire,
525 Park Avenue,
New York City.

One (1) foyer bench recovered with
imported cut velvet 37.50
Trucking to and from upholsterer 12.00
49.50

Delivered by Larson Trucking Co.

3

1/

2282

MARY R. BROEDY A.S.I.D.
Interiors

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3086

INVOICE
December 26th, 1963

Miss Phyllis McGuire,
525 Park Avenue,
New York City.

1 fruitwood finish double seat piano bench;
turqoise velvet upholstery.

	240.00	
Sales tax	9.60	249.60
Delivery		4.00
		$253.60

(delivered 12/24/63)

229a

MARY R. BROEDY
Interiors
N.S.I.D.

1064 MANOR AVENUE • NEW YORK 72, N. Y.
TELEPHONE TIVOLI 2-3986

INVOICE

January 4th, 1963.

Miss Phyllis McGuire,
525 Park Avenue,
New York City.

3	9-½ x 11-3/8	3514 frames	@6.30	18.90
2	0-½ x 11	3728 frames	@ 5.00	10.00
2	9-3/8 x 11-½	3948 frames	@ 4.95	9.90
1	11-3/8 x 13-3/8	3788 frame		8.60
1	7-7/8 x 9-3/4	3948 frame		4.05
				51.45
			Sales Tax	1.54
				$52.99

Mary L Brady
1064 Lamon Ave
Grand Jay.

Jas Phyllis McClure
[illegible] Park Ave
Jay C

June 11 1962

1- Bronze & crystal chandelier
for master bathroom. 64.00
Tax 1.45
66.45

Installation 10.00
76.45

cables principle newyork

PLAINTIFF'S EXHIBIT 7 - PURCHASE ORDERS 231a

AMERICAN S.E.R.P.E. CORPORATION

716 madison avenue at 63rd street

new york 21 N Y

telephone templeton 8 7000

our registered trade mark



showrooms in new york

imported jewelry and clocks
imported handbags and novelties
imported toys
imported hour glasses
225 5th avenue (gift and art center)

imported furniture and marble
716 madison avenue at 63rd street
and 225 fifth avenue (gift and art center)

paris office
10 rue royale
paris 8 france
cables principle paris

TO MARY R BRODEY MRS
1064 MANOR AVE
NEW YORK 72 N Y

TI 2 3986

10th August 1962
(date of opening of deposit)

POSITIVELY! no deductions
of unearned discounts allowed

our no	your order no	your dept no	shipped via	salesman	terms see special order terms
238-36	P Maguire		truckers	ASH	

quantity	style no	origin	description	unit price LIST	total NET
one	[illegible]		ribbon & reed basin plumbing fittings 24 KT goldplated % 1/3	$160.00	$ 106.67
one	01.D		ribbon & reed separate tub & shower plumbing fittings (original schedule regular tub & shower, final quotation separate tub & shower % 1/3	$370.00	$ 246.67
one	special	Italy	sculptured tub plumbing marble shield shaped sides and top, GO moulding, approx 27" H by 18" W %20 %	$ 75.00	$ 60.00
one	special	Italy	side toilet chair, as per your model submitted, chinese type simulated bamboo, however with closed front toilet seat, finish: black antiqued gold leaf antiqued highlighting new list price $ 300.00 but sold to you still at old list of $270.00, for chinese model add to list $ 40.50 % 1/3	$310.50	$ 207.00
one	special	Italy	bathtub medicine cabinet & frame and one deep medicine cabinet & frame, finished inside and outside white and gold leaf antiqued as the commode, sturdy construction, complete with polished plate glass in hand-carved frames, latter very narrow: approx 1. 5/8", mirrorstripped, no corner knuckles & gold leaf finish, list for medicine cabinets % 1/3%	$720.00	$ 480.00
			list for pol plt glass for handcarved frames % 20%	$121.50	$ 97.20
two	special	Italy	framed mirrors: frames % 20%	$384.00	$ 307.20
			polished plate glass mirrors % 20%	202.50	$ 162.00
					$1008.54

subject to errors, corrections, omissions or withdrawal without notice. all areas and dimensions are approximate

this transaction is subject to the following terms

positively! no exchanges, return shipments or deductions from invoices accepted without our prior written authorization!!! return merchandise subject to handling charge
our payment terms start according to date of invoice and not date of arrival of merchandise
items shipped in perfect working order, if found non-working or damaged or partly lost on arrival: 1) - enter claim with carrier and 2) - notify us in writing within 5 days of receipt of merchandise after 5 days positively all repairs at your expense unless claims for damage of any nature are given to us in writing within 5 days of receipt of merchandise, they shall be deemed void
all our prices on existing imported stock are F. O. B. our premises or at port import orders F. O. B. pier N. Y. area and packing, crating, handling and shipping charges on merchandise sent to and from our premises are payable by client therefore all merchandise comes to be our responsibility after leaving our premises or pier and we are not responsible for merchandise damaged on your premises after merchandise leaves our premises in good condition. all claims must be handled between consignee and carrier who is insured
all deliveries via truckers are normally sidewalk deliveries and you are not responsible for disposal of any packing material
all agreements contingent upon [illegible] subject to strikes accidents delays of carriers or other causes beyond our control
in the case of merchandise to be installed on clients premises merchandise and labor are invoiced separately and all merchandise is payable and due F. O. B. our premises prior to shipment
off premise survey subject to consultation fee, which is deductible in case of order
on special orders down payment of ½ of the gross amount will be expected before work can be started; balance payable and due upon delivery. cancellations on any special order work positively not accepted
on all spcl order contract and installation work labor is always billed separately from merchandise and all prices of merchandise on spcl order work is subject to 5-10% customary budget loss variance plus or minus and on labor 15% plus or minus, both because of job conditions, unforeseen or otherwise. photo privileges reserved due to our design and model copyright.
color match to samples submitted not guaranteed
prices subject to change without notice, unless signed firm order with deposit had been accepted by us
if upon investigation of the references furnished it is found that the person entering into this contract is not in fact a bonafide interior decorator or a recognized member of the trade and therefore not entitled to the discount shown in this contract than the prices in this contract shall be amended to their list prices but the contract remains in force
if merchandise or a service is tendered and not fully paid for within 30 days any deposit is forfeited
undersigned hereby agrees goods mentioned are sold, bought, delivered and received subject express condition title thereto shall remain in American S.E.R.P.E. Corp. until full payment of purchase price thereof

signature of purchaser.....

cables principle parisnyk

Plaintiff's Exhibit 7 - Purchase Orders 2328

AMERICAN S. E. R. P. E. CORPORATION

716 madison avenue at 63rd street

new york 21 N Y

telephone templeton P 7000

our registered trade mark

SINCE 1870 FARO IMPORTS PARIS NEW YORK

showrooms in new york

imported jewelry and clocks
imported handbags and novelties
imported toys
imported hour glasses
225 5th avenue (gift and art center)

imported furniture and marble
716 madison avenue at 63rd street
and 225 fifth avenue (gift and art center)

paris office
10 rue royale
paris 8 france

cables principle paris

TO MARY A BRODDY NSID

10 August 1962

page 2

POSITIVELY! no deductions of unearned discounts allowed

our no	your order no	your dept no	shipped via	salesman	terms

quantity	style no	origin	description	unit price List	total NET
			report from page one		$1646.84
one	special	Italy	Lavabo commode approx 36" long, oatty cornered, shaped & bamboo, finish: white & gold leaf antiqued our regular list: $ 414.00 % 20%	$ 414.00	$ 331.20
one	special	Italy	7/8" thick marble lavabo top, oatty cornered, our regular list for such piece $216.00 special price to you: % 20%	$ 186.00	$ 148.80
one	special	Italy	dressing table, approx 30", oatty cornered shaped and bamboo, finish: white & gold leaf antiqued % 20%	$ 690.00	$ 552.00
one	special	Italy	dressing table marble top, flat surface no holes, 7/8" thick, OG moulding % 20%	$ 180.00	$ 144.00
three	special	Italy	lighting fixtures with frosted glass fronts % 20%	$ 540.00	$ 432.00
three	special	Italy	marble wall splashes, 6" high, OG moulding on sides & top, rounded top corners at ends their lenght being approx 8 units at list ea $ 30.00 % 20%	$ 150.00	$ 120.00
one	set		non rustable brass basin clamps including exclusive installation with expansive screw anchors, into under surface of marble lavabo top % 20%	$ 9.00	$ 7.20
one	special		hand decorated vitrious china basin small size, 15" x 12", your choice of motif to be submitted, regular price: $ 75.00 list special price to you: % 1/3%	$ 72.00	49.00
					$ 3455.74

subject to errors, corrections, omissions or withdrawal without notice. all areas and dimensions are approximate

this transaction is subject to the following terms

positively no exchanges, return shipments or deductions from invoices accepted without our prior written authorisation!!! return merchandise subject to handling charge
our payment terms start accordingly to date of invoice and not date of arrival of merchandise
items shipped in parts pending arrival if found non-existing or damaged or partly lost cf. art. 11 - enter claim with carrier and 21 - notify us in writing within
5 days of receipt of merchandise after 5 days positively all repairs at your expense unless claims for damage of any nature are given to us in writing within 5 days of
receipt of merchandise they shall be deemed void

all our prices on catalogs imported stock are F. O. B. our premises or on spcl import orders F. O. B. pier N. Y. area and packing, crating, handling and shipping charges on
merchandise sent to and from our premises are payable by client therefore all merchandise ceases to be our responsibility after leaving our premises or pier and we are
not responsible for merchandise damaged or your premises after merchandise leaves our premises in good condition. all claims must be handled between consignee and carrier
who is insured

all deliveries via trucking are curbside delivered and we are not responsible for disposal of any packing material
all agreements contingent upon and subject to strikes accidents delays of carriers or other causes beyond our control
in the case of merchandise to be translated on clients premises merchandise and labor are invoiced seperately and all merchandise is payable and due F. O. B. our premises
prior to shipment

all promises survey subject to consultation fee, which is deductible in case of order
on special orders, upon payment of 1/3 of the gross amount will be expected before work can be started; balance payable and due upon delivery, cancellation of specially special
orders once definitively not acceptable

on all contracts containing and including work labor is always billed seperately from merchandise and all prices of merchandise on special order work is subject to 5-10% customary
increase. Our estimates are of maximum on labor 10% plus or minus, both because of job conditions unforeseen or otherwise. photo privileges reserved due to design and
model changes

color matching samples submitted not guaranteed

prices subject to change without notice unless signed firm order with deposit had been accepted by us

it is understood that in the event a furnished it is found that the person entering into this contract is not in fact a bonafide interior decorator or a recognized member of
the trade and therefore not entitled to the discount shown in this contract than the prices in this contract shall be amended to their list prices but the contract remains in force
if report does or a cash sale not fully paid for within 30 days any deposit is forfeited

unpacked and assembled merchandise are sold, bought, delivered and received subject express condition title thereto shall remain in American S.E.R.P.E. Corp. until
full payment of purchase price thereof

signature of purchaser.....

cables...principle new york

Plaintiff's Exhibit 7 - Purchase Orders 233a

AMERICAN S. E. R. P. E. CORPORATION

716 madison avenue at 63rd street
new york 21 n y
telephone tenderloin 8 7010
our registered trade mark

SINCE 1872 A.S.E.R.P.E. IMPORTS PARIS NEW YORK

showrooms in new york
imported jewelry and clocks
imported handbags and novelties
imported toys
imported hour glasses
225 5th avenue (gift and art center)
imported furniture and marble
716 madison avenue at 63rd street
and 225 fifth avenue (gift and art center)

paris office
10 rue royale
paris 8 france
cables principle paris

TO MARY A BROOM RSID

10 August 1962

page 3

POSITIVELY! no deductions of unearned discounts allowed

our no	your order no	your dept no	shipped via	salesman	terms

quantity	style no	origin	description	unit price LIST	total NET
			report from page two		$3465.74
	later added items:				
			Marble: your final choice of color being "CALACATTA DORATO" (white & gold) we add our standard premium of 20% for this marble on all above marble items $ 472.80		$ 94.56
			You later specified that the mirrored East wall shall, therefore, be extended from the initially [illegible] commode lenght of 60" to the side of tub, therefore lenght now totalling 77", and the price of glass rising disproportionately with greater lenght, we add not:		$ 87.50
			above modification necessitated enlarging the lenght of the East wall surrounding mirror frame, and we add not:		$ 55.20
one	special		gold anodized shower curtain rod for recessed tub not		$ 21.00
two			flanges and screws, 24 KT gldplid not		$ 4.50
					$3668.50

subject to errors, corrections, omissions or withdrawal without notice. all areas and dimensions are approximate

this transaction is subject to the following terms

positively! no exchanges, return shipments or deductions from invoices accepted without our prior written authorization!!! return merchandise subject to handling charge
our payment terms, net cash due 30 days from date of invoice and not date of arrival of merchandise
items shipped in parts are
5 days of receipt of merchandise. they will be found non-warrantied or damaged or partly missing on arrival; 1) - enter claim with carrier and 2) - notify us in writing within
account of merchandise. they will be found non-warrantied or damaged or partly missing on arrival; 1) - enter claim with carrier and 2) - notify us in writing within 5 days of
all our prices on existing items are F. O. B. our premises or on spot import are F. O. B. pier N. Y. area and packing, crating handling and shipping charges on
merchandise sent by mail from our premises are payable by client therefore all risk ceases to be our responsibility after leaving our premises or pier and we are
not responsible for merchandise damaged on your premises after merchandise leaves our premises in good condition. all claims must be handled between consignee and carrier
who is insured
all deliveries via truckers are normally sidewalk deliveries and we are not responsible for disposal of any packing material
all agreements contingent upon and subject to strikes accidents delays of carriers or other causes beyond our control
in the case of merchandise stored with clients premises merchandise and labor are invoiced separately and all merchandise is payable and due F. O. B. our premises
prior to shipment
off premises survey subject to consultation fee, which is deductible in case of order
on special orders a down payment of ½ of the gross amount will be expected before work can be started; balance payable and due upon delivery. cancellations by client
after work positively not accepted
all [illegible] contract and installation work labor is always billed separately from merchandise and all prices of merchandise on special order work is subject to 5-10% customary
[illegible] and no [illegible] plus or minus, both because of job conditions, unforeseen or otherwise photo privileges reserved due to our various and
[illegible] samples of paint [illegible] represented
prices subject to change without notice. unless signed firm order with deposit had been accepted by us
if upon investigation of the references furnished it is found that the person entering into this contract is not in fact a bonafide interior decorator or a recognized member of
the trade and therefore not entitled to the discount shown in this contract then the prices in this contract shall be amended to their list prices but the contract remains in force
of merchandise or a service is tendered and not fully paid for within 30 days, any deposit is forfeited
undersigned hereby agrees goods mentioned are sold, bought, delivered and received subject express condition title thereto shall remain in American S.E.R.P.E. Corp. until
full payment of purchase price thereof

signature of purchaser.....

cables principle newyork

Plaintiff's Exhibit 7 - Purchase Orders 234a

AMERICAN S. E. R. P. E. CORPORATION

716 madison avenue at 63rd street
new york 21 n y
telephone templeton 8 7000
our registered trade mark

SERPE 1870 IMPORTS PARIS NEW YORK

showrooms in new york
imported jewelry and clocks
imported handbags and novelties
imported toys
imported hour glasses
225 5th avenue (gift and art center)

imported furniture and marble
716 madison avenue at 63rd street
and 225 fifth avenue (gift and art center)

paris office
10 rue royale
paris 8 france
cables principle paris

TO
MARY R BRODDY RSID

10 August 1962

POSITIVELY! no deductions of unearned discounts allowed

our no	your order no	your dept no	shipped via	salesman	terms

quantity	style no	origin	description	unit price	total
			LABOR:		NET
			Install wall splash boards assembly		$ 40.00
			plumbing installation, basin plumbing fittings		$ 110.00
			plumbing installation, tub and shower plumbing fittings		$ 150.00
			5 electric outlets		$ 125.00
			carefully take out all installed fixtures to upstair delivery entrance		$ 60.00
			demolition of all tiles behind existing commode and existing mirrors		$ 60.00
			cut 5 holes to marble tub shield and affix to wall		$ 37.50
			installation of 2 medicine cabinets (our normal charge for this small standard size is $ 30.00 ea) we charge you for 2 very large units, which have to be scribbed and unified $ 45.00 ea		$ 90.00
			installation of 2 large frames and their mirrors $ 30.00 ea		$ 60.00
			installation dressing table and its marble, into proper unison with lavabo commode and marble lavabo top		$ 30.00
			installation of 3 lighting fixtures in proper unison, abstract of their electric work, $ 25.00 ea		$ 75.00
			installation of straight shower curtain rod into tile wall		$ 7.50
			totals		~~$ 885.00~~

subject to errors, corrections, omissions or withdrawal without notice. all areas and dimensions are approximate

this transaction is subject to the following terms

positively no exchanges, return shipments or deductions from invoices accepted will exist our prior written authorization!!! return merchandise subject to handling charge
our payment terms short according to date of invoice and not date of arrival of merchandise
items shipped in perfect working order, if found non-working or damaged or partially on arrival: 1) - enter claim with carrier and 2) - notify us in writing within 5 days of receipt of merchandise after 5 days positively all repairs at your expense unless claims for damage of any nature are given to us in writing within 5 days of receipt of merchandise, they shall be deemed void
all our prices on existing imported stock are F. O. B. our premises or on special items orders F. O. B. pier N. Y. crate and packing, crating, handling and shipping charges on merchandise sent to and from our premises are payable by client therefore all risk for merchandise or damage to same is the responsibility after leaving our premises at pier and we are not responsible for merchandise damaged on your premises after merchandise has been delivered in good condition. all claims must be handled between consignee and carrier who is insured
all deliveries via truckers are normally sidewalk deliveries and we are not responsible for disposal of any packing material
all agreements contingent upon and subject to strikes accidents delays of carriers or other causes beyond our control
in the case of merchandise to be installed on clients premises merchandise and labor are invoiced separately and all merchandise is payable and due F. O. B. our premises prior to shipment
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on all spot order contract and installation work labor is always billed separately from merchandise and all prices of merchandise on spot order work is subject to 5-10% customary budget base variance plus or minus, and on labor 15% plus or minus, both because of job conditions, unforeseen or otherwise. photo privileges reserved due to our design art model copyright
color match to samples submitted not guaranteed
prices subject to change without notice, unless signed firm order with deposit had been accepted by us
if upon investigation of the references furnished it is found that the person entering into this contract is not in fact a bonafide interior decorator or a recognized member of the trade and therefore not entitled to the discount shown in this contract then the prices in this contract shall be amended to their list prices but the contract remains in force
if merchandise or a service is rendered and not fully paid for within 30 days any deposit is forfeited
undersigned hereby agrees goods mentioned are sold, bought, delivered and received subject express condition title thereto shall remain in American S.E.R.P.E. Corp until full payment of purchase price thereof

signature of purchaser.....

cables principle newyork

AMERICAN S. E. R. P. E. CORPORATION

716 madison avenue at 63rd street
new york 21 n y
telephone templeton 8 7000
our registered trade mark

SINCE 1878 ABRO IMPORTS PARIS NEW YORK

showrooms in new york
imported jewelry and clocks
imported handbags and novelties
imported toys
imported hour glasses
225 5th avenue (gift and art center)

imported furniture and marble
716 madison avenue at 63rd street
and 225 fifth avenue (gift and art center)

paris office
10 rue royale
paris 8 france
cables principle paris

TO MARY R BRODDY NSID

10 August 1962

POSITIVELY! no deductions of unearned discounts allowed

	your order no	your dept no	shipped via	salesman	terms

tity	style no	origin	description	unit price	total
			RECAPITULATION		
			merchandise $ 3,688.50		
			labor $ 853.00		
			$ 4,541.50		
			50% deposit requested $ 2,270.75		
			advance deposit received $ 1,727.00		
			open balance of deposit: $ 543.75		
			please remit: $ 543.75		

to errors, corrections, omissions or withdrawal without notice. all areas and dimensions are approximate

transaction is subject to the following terms

ly! no exchanges, return shipments or deductions from invoices accepted without our prior written authorisation!!! return merchandise subject to handling charge
yment terms start according to date of invoice and not date of arrival of merchandise
hipped in perfect working order, if found non-working or damaged or partly lost on arrival: 1) - enter claim with carrier and 2) - notify us in writing within of receipt of merchandise after 5 days positively all repairs at your expense unless claims for damage of any nature are given to us in writing within 5 days of of merchandise, they shall be deemed void
prices on existing imported stock are F. O. B. our premises or on spot import orders F. O. B. pier N. Y. area and packing, crating handling and shipping charges on ndise sent to and from our premises are payable by client therefore all merchandise ceases to be our responsibility after leaving our premises or pier and we are onsible for merchandise damaged on your premises after merchandise leaves our premises in good condition. all claims must be handled between consignee and carrier nsured
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mise survey subject to consultation fee, which is deductible in case of order
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ch to samples submitted not guaranteed
bject to change without notice, unless signed firm order with deposit had been accepted by us
investigation of the references furnished it is found that the person entering into this contract is not in fact a bonafide interior decorator or a recognised member of e and therefore not entitled to the discount shown in this contract then the prices in this contract shall be amended to their list prices but the contract remains in force handise or a service is tendered and not fully paid for within 30 days any deposit is forfeited
ned hereby agrees goods mentioned are sold, bought, delivered and received subject aforesaid condition title thereto shall remain in American S.E.R.P.E. Corp. until

ONLY COPY AVAILABLE

cables principle newyork

DEFENDANT'S EXHIBIT C - LETTER TO PHYLLIS McGUIRE FROM AMERICAN S.E.R.P.E. CORP. DATED JUNE 12, 1963 236a

AMERICAN S.E.R.P.E. CORPORATION

716 749 madison avenue (at 65th street)
new york 21 n y
telephone regent 7 3000
& Me 3 7000
our registered trade mark

SINCE 1878 ABBRO IMPORTS PARIS NEW YORK

showrooms in new york
imported jewelry and clocks
imported handbags and novelties
imported toys
imported hour glasses
225 5th avenue (gift and art center)

imported furniture and marble
749 madison avenue (at 65th street)
and 225 fifth avenue (gift and art center)

paris office
10 rue royale
paris 8 france
cables principle paris

12 June 1963 nsm/es/3

Miss Phyllis McGuire
525 Park Avenue
New York

Dear Miss McGuire

Miss Mary Broedy telephoned us yesterday several times, and when she was out of nickels and gave us the number of a telephone booth, we were unable to reach her back, as apparently and mysteriously she left. We are also not supposed to telephone her during the daytime at her downtown office.

Inasmuch as she, Miss Broedy, alledged that you apparently do not believe her regarding the seriousness of her resource, namely us, and that the bathroom will come in short order, and in order to get word to you, as we cannot telephone Miss Broedy, and while this letter had not been sollicited by Miss Broedy, we are herewith sending you by hand this assurance that all is in good order with the order and that same should be here in short order.

Everything from Europe has come in of late with some delay due to their being swamped with business from other than the States, and from the Common Market.

It is a fact that Miss Broedy is not at fault in this matter.

Thanking you for your consideration

yours very truly

AMERICAN S.E.R.P.E. CORPORATION
n steinhardt muller
pres

DEFENDANT'S EXHIBIT K FOR IDENTIFICATION AMENDED RESPONSE TO REQUEST FOR ADMISSION 237a

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MARY BRODDY,	:	Civ. #4172 - 1969
Plaintiff,	:	
-against-	:	AMENDED RESPONSE TO REQUEST FOR ADMISSION.
PHYLLIS McGUIRE,	:	
Defendant.	:	

PHYLLIS McGUIRE, defendant, makes the following sworn statement in response to the request of plaintiff for admission of facts, heretofore served upon her, defendant's previously served response having been objected to by plaintiff on February 1st, 1972, as unsworn.

Request #1: All of the items listed on the schedule attached hereto were delivered by the plaintiff and were received by the defendant on or about the dates set forth in said schedule.

Response to Request #1:

I cannot admit or deny that "all" items listed in the schedule attached to the notice to admit were delivered by plaintiff and received by me on the dates, if any, stated therein.

For example, plaintiff fails to state in such schedule, when, if ever, items aggregating $10,056.00 were delivered or received. Those items amount to 62% of the amount claimed by plaintiff, aside from 10% commissions of $2,112.00, to which I never agreed. According to the complaint the services and sales alleged by plaintiff to me took place between November 1961 and December 1964 (Complaint, par. 3). Aside from commissions claimed belatedly, the prayer for relief comes to $16,122.00.

The first 8 items on the schedule are undated as to year and are priced in the aggregate at $2,745.00. The date of alleged delivery is put at 1/18.

and 1 rocker recovered) are priced at $367.20 under date of 12/23/64.

Next come "decoration restored on one vase and closet removed from den" for $50.00. The inexact date is 1/21.

Passing to the largest item, $4,341.50, is custom bathroom furniture and fixtures ordered from American S.E.R.P.E. Corp. on August 10th, 1962. No delivery date to me is stated and no bathroom fixtures ordered by Serpe were ever delivered.

Finally, there is the substantial item of "One bedroom rug and one foyer rug", priced at $2,641.95, whether with or without sales tax is not stated. These two items bear no claimed date of delivery to or receipt by me.

The foregoing items aggregate 62% in amount of the damages claimed by plaintiff, aside from the 10% commission. Since no specified date of delivery or receipt in any year is mentioned, with one exception, by plaintiff in her attached schedule, I can neither admit nor deny as to those items, especially at this late date more than nine years after 1962, when most of the alleged services were performed and alleged deliveries made.

I categorically deny that the above-mentioned exception, i.e., rocker recovered and chaise longue, occurred in December, 1964.

As to the other items scheduled I cannot at this late date 10 or 11 years after claimed delivery or service rendered, truthfully admit or deny their delivery to my former New York apartment, from which I removed in 1968. For instance, framing of unnamed number of pictures are asserted by plaintiff on 6/28/62, 12/62 and 1/64. The last of these items, 9 pictures framed, $52.90, was actually done in 1963 according to an invoice of plaintiff therefor.

The last item on the schedule, 1 bathroom chandelier, 1/64, was not supplied to me at any time according to Enice Jobe, my housekeeper in 1964.

Request #2: For three years prior to the commencement of this action the defendant was not a resident of the State of New York.

Defendant's Exhibit K For Identification Amended Response to Request For Admission 239a

Response to Request #2:

Defendant denies the truth of the matter set forth in Request #2, since defendant maintained her residence in New York City until October 1st, 1968.

s/ PHYLLIS McGUIRE
Phyllis McGuire.

A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC.

U.S. COURT OF APPEALS:SECOND CIRCUIT

BROEDY,
Appellee,

against

[redacted]
MC GUIRE,
Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, James Steele, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 250 West 146th Street, New York, New York

That on the 26th day of June 1974 at 36 W. 44th Street, New York deponent served the annexed Appellant's Appendix upon Leight, Drimmer & Weinstein-Attorneys for Appellee

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

James Steele
Print name beneath signature

JAMES STEELE

Sworn to before me, this 26th day of June 1974

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975